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## What Is Morality Anyway

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## Giannella Lecture

### WHAT IS "MORALITY" ANYWAY?\*

MICHAEL J. PERRY\*\*

*Much contemporary moral philosophy, particularly but not only in the English-speaking world, has given such a narrow focus to morality . . . . This moral philosophy has tended to focus on what it is right to do rather than on what it is good to be, on defining the content of obligation rather than the nature of the good life . . . . This philosophy has accredited a cramped and truncated view of morality in a narrow sense, as well as of the whole range of issues involved in the attempt to live the best possible life, and this not only among professional philosophers, but with a wider public.*

—Charles Taylor<sup>1</sup>

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Some of this Essay revisits some issues addressed in my book, MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* (1998). I am grateful to the Oxford University Press for permission to use some passages from *The Idea of Human Rights* in this Essay.

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1. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 3 (1989) [hereinafter TAYLOR, *SOURCES OF THE SELF*]. Taylor continues: [Such moral theories] leave us with nothing to say to someone who asks why he should be moral. . . . But this could be misleading, if we seemed to be asking how we could convince someone who saw none of the point of our moral beliefs. There is nothing we can do to 'prove' we are right to such a person. But imagine him to be asking another question: he could be asking us to make plain the point of our moral code, to articulate what's uniquely valuable in cleaving to these injunctions. Then the implication of these theories is that we have nothing to say which can impart insight. We can wax rhetorical and propagandize, but we can't say what's good or valuable about [the injunctions], or why they command assent. *Id.* at 87. Taylor's book *Sources of the Self*, is, among other things, a powerful argument for a different, larger understanding of "moral." See *id.* at 4, 14-15, 63-64, 79,

MANY law professors spend a lot of time these days talking about “morality.” Indeed, one of the most prominent legal academics of his generation, Ronald Dworkin, is, whatever else he may be, a moral philosopher. As is another influential Oxford law professor: Dworkin’s colleague, and nemesis, John Finnis.<sup>2</sup> The University of Chicago Law School has appointed a moral philosopher, Martha Nussbaum, to its faculty.<sup>3</sup> A founding father of “law and economics,” Richard Posner, although not himself a moral philosopher, devoted the major part of his Oliver Wendell Holmes Lectures at Harvard, in October 1997, to savaging what he called “academic moralism.”<sup>4</sup>

The penetration of legal discourse by moral discourse is not surprising. Moral controversy is often at the center of legal controversy; in particular, controversy about whether one or another practice (abortion, homosexual sexual conduct, physician-assisted suicide, etc.) is, at least in some instances, morally permissible is often at the center of controversy about whether the practice should be, at least in some instances, legally permissible.

Not that one who believes that particular conduct is immoral will always want the law to ban the conduct. One who believes that (particular) conduct is immoral may have good reasons to want the law not to ban the conduct.<sup>5</sup> (Similarly, one who believes that conduct—e.g., physician-as-

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87; see also Charles Taylor, *A Most Peculiar Institution*, in *WORLD, MIND, & ETHICS: ESSAYS ON THE ETHICAL PHILOSOPHY OF BERNARD WILLIAMS* 132 (J.E.J. Altham & Ross Harrison eds., 1995) [hereinafter Taylor, *A Most Peculiar Institution*]; Charles Taylor, *Iris Murdoch & Moral Philosophy*, in *IRIS MURDOCH AND THE SEARCH FOR HUMAN GOODNESS* 3 (Maria Antonaccio & William Schweiker eds., 1996) [hereinafter Taylor, *Murdoch & Moral Philosophy*].

2. Finnis divides his time between Oxford and Notre Dame. Before he recently retired from his position at Oxford, Dworkin divided his time between Oxford and New York University. I understand that Dworkin will now divide his time between University College London and New York University. The heated debate between Dworkin and Finnis is longstanding. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 221-22 (1980). For a recent instance of the debate, see generally Transcript, *The Fifth Annual Fritz B. Burns Lecture: Euthanasia, Morality, and the Law*, 30 LOY. L.A. L. REV. 1465 (1997).

3. I could go on listing the names of law professors, or former law professors, who are, whatever else they may be, moral philosophers: Charles Fried (Harvard), Michael Moore (University of Pennsylvania), Joseph Raz (Oxford and Columbia), Jeremy Waldron (Columbia) and so on. Some of my own work addresses issues in moral philosophy. See, e.g., MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* (1998) [hereinafter PERRY, *FOUR INQUIRIES*]; MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988) [hereinafter PERRY, *MORALITY*].

4. See Richard A. Posner, *The Problematics of Moral and Political Theory*, 111 HARV. L. REV. 1638, 1639 (1998). For Posner’s explanation of what he means by “academic moralism,” see *infra* note 102 and accompanying text.

5. See ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 42-43 (1993) (listing such reasons). The United States Constitution has been interpreted to forbid government to ban abortion, which is conduct many believe to be immoral. See *Roe v. Wade*, 410 U.S. 113, 115 (1973). I comment on the Supreme Court’s decision in *Roe* in my book, MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (1999). Cf. Richard

sisted suicide—is sometimes a morally acceptable option may have good reasons to want the law to ban the conduct.<sup>6</sup>) Nonetheless, with respect to conduct believed by many to be immoral, the claim that the conduct is immoral is typically an important part of the argument that the law ought to ban, or otherwise disfavor, the conduct.<sup>7</sup> It is worth noting that the law can disfavor conduct without banning it. Consider, for example, the case of same-sex marriages, which exist in spite of the fact that the law does not recognize them.<sup>8</sup> For the law not to recognize same-sex marriages—that

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A. Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796, 1814 (1998) ("That a case involves a moral issue does not mean that the court must resolve that issue in order to decide the case.").

6. See *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997) (discussing ban on physician-assisted suicide). In *Glucksberg*, the Supreme Court noted that:

[The New York State Task Force on Life and the Law] expressed its concern that, because depression is difficult to diagnose, physicians and medical professionals often fail to respond adequately to seriously ill patients' needs. Thus, legal physician-assisted suicide could make it more difficult for the State to protect depressed or mentally ill persons . . . .

*Id.* at 731. The Court then added:

[T]he State has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes . . . . We have recognized . . . the real risk of subtle coercion and undue influence in end-of-life situations. Similarly, the New York Task Force warned that "legalizing physician-assisted suicide would pose profound risks to many individuals who are ill and vulnerable. . . . The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group." If physician-assisted suicide were permitted, many might resort to it to spare their families the substantial financial burden of end-of-life health-care costs.

The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill persons from prejudice, negative and inaccurate stereotypes, and "societal indifference." The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy, and that a seriously disabled person's suicidal impulses should be interpreted and treated the same way as anyone else's.

*Id.* at 731-32.

7. See, e.g., GEORGE, *supra* note 7, at 43. It bears emphasis here that, as Kent Greenawalt has observed:

[M]uch legal enforcement of morality is uncontroversial and rarely discussed. Disagreement arises only when the law enforces aspects of morality that do not involve protecting others from fairly direct harms. More precisely, people raise questions about legal requirements (1) to perform acts that benefit others, (2) to refrain from acts that cause indirect harm to others, (3) to refrain from acts that cause harm to themselves, (4) to refrain from acts that offend others, and (5) to refrain from acts that others believe are immoral.

Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 710 (1995).

8. See David McCarthy Matzko, *Homosexuality and the Practices of Marriage*, 13 MOD. THEOLOGY 371, 372 (1997):

is, for the law not to extend to homosexual marriages the benefits it grants to heterosexual marriages—is not for the law to ban same-sex marriages, but it is for the law to disfavor them.

As I said, the penetration of legal discourse by moral discourse is not surprising. Nor is it problematic. In a recent essay, Jean Bethke Elshtain is sharply and, in my judgment, rightly critical of those who argue that we ought to de-moralize the law: “[O]ne can rightly put ethical and moral questions to the law and expect ethical and moral answers.”<sup>9</sup> Indeed, Elshtain even suggests that we think of “the law professor as an ethical and moral philosopher of sorts.”<sup>10</sup> According to Elshtain, “the law professor as philosopher is in the best position to respect and to transmit” what Elshtain calls “the law’s moral and philosophical enterprise.”<sup>11</sup> In any event, talk about morality, mainly in the form of moral argument, is pervasive in the contemporary legal academy.

Notwithstanding all our morality-talk, however, it is often obscure what we citizens of the legal academy, and others, are talking about—and often clear that we are not all talking about the same thing—when we talk (argue) about “morality.”

# I

Happily for us Bulls fans, there was no Game 7 in the 1998 NBA Finals. The Bulls won Game 6—and with it, their sixth national championship—when Michael Jordan sunk a breathtaking jump shot in the final seconds of play.<sup>12</sup> But if there had been a Game 7—a game that would have been Jordan’s last as a Bull and even as a professional—I would have had a reason not to be doing what I was doing the evening Game 7 would have been played (June 17): camping with my family in the Shining Rock Wilderness region of the southern Appalachians. (Not that I would have had a conclusive reason. To the contrary, I would have had a *conclusive* reason to be camping with my family the evening of June 17 even if it had meant missing Game 7.) The idea of a reason for doing something, or for not doing something, is easy enough to grasp. Doing something, or not doing something, can be, as in my example, a means to a desired end. (The means might be both necessary and sufficient, neither necessary nor

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[C]ertain same-sex unions already are functioning in their communities as marriages. These gay and lesbian couples support and are supported by the community’s practices of marriage and family as a whole. With these unions already in place, the task is not to reformulate marriage so that gays and lesbians might enter. Instead, the task is to understand how and why these same-sex unions fit so well, given that so many good arguments are made against them.

9. Jean Bethke Elshtain, *Law and the Moral Life*, 11 YALE J.L. & HUMAN. 383, 386 (1999).

10. *Id.* at 385.

11. *Id.* at 386.

12. See Jean Bethke Elshtain, *The Light Sometimes Shines*, TIKKUN, Sept.-Oct. 1998, at 16.

sufficient, necessary but not sufficient, or sufficient but not necessary.) Doing something, or not doing something, can also be a desired end—or both a desired end and a means to a desired end. If I were a sports writer, watching the Bulls play in the 1998 NBA Finals would have been, for me, a means as well as an end.

But when is a reason for doing something, or for not doing something, a "moral" reason? (If there had been a Game 7, would I have had a "moral" reason not to be camping in the Appalachian wilderness the evening of June 17?) What kind of reason is a "moral" reason? What does it mean to say that a reason is a "moral" reason? *What is "morality" anyway?*

Let us focus on actions of the most relevant sort: actions intended, at least in part, to serve the welfare of another person. (By "action," I refer to "not doing something" as well as to "doing something.") We can have many different kinds of reasons for acting in order to serve rather than ignore or even attack the welfare—the well-being, the needs, the interests—of another. I might have, for example, an economic reason for acting to serve your welfare: I can't do what I want to do this weekend unless I earn \$100, and acting to serve your welfare is the only, or easiest, way for me to do that. I might also have a reason for acting to serve your welfare that does not depend on your ability or willingness to pay me for doing so. This additional reason might be a moral reason. But, again, what is a "moral" reason? When is a reason for acting to serve another's welfare a "moral" reason?

Consider the following passage from Judge Posner's Holmes Lectures:

Morality is the set of duties to others (not necessarily just other people—the duties could run to animals as well, or, importantly, to God) that are supposed to check our merely self-interested, emotional, or sentimental reactions to serious questions of human conduct. It is concerned with what we owe, rather than what we are owed . . . .<sup>13</sup>

We may infer from this passage that for Judge Posner to say that a reason of the relevant sort—a reason for acting in order to serve another's welfare—is a "moral" reason is to say that the reason is not, that it does not appeal to, either one's self-interest or one's emotional or sentimental concern for or attachment to the other person—or, indeed, on one's emotional or sentimental concern for or attachment to any other person. (Rather than say "one's emotional or sentimental concern for or attach-

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13. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 4 (1999). Posner adds, where I have put the ellipsis: ". . . except insofar as a sense of entitlement (to happiness, self-fulfillment, an interesting life, an opportunity to exercise our talents, to realize ourselves, and so on) might impose a duty on others to help us get what we are entitled to." Posner's book, *The Problematics of Moral and Legal Theory*, is a revised version of his Holmes Lectures, which were first published in the *Harvard Law Review*. See generally Posner, *supra* note 4, and accompanying text.

ment to" I will say simply "one's emotional concern (or concerns).") A "moral" reason, in Posner's view, is meant to "check" both one's self-interest and one's emotional concerns.<sup>14</sup> Posner's way of speaking ("duties to others") fails to accommodate the common view that among the things that one morally ought or ought not to do are things that one ought or ought not to do to or for oneself—the common view, that is, that one has moral duties to oneself as well as to others.<sup>15</sup> But for present purposes let us bracket that problem and inquire whether Posner's position about what a "moral" reason is—Posner's understanding of "morality"—is otherwise problematic. Posner's position is common among many contemporary secular moral theorists.<sup>16</sup> So in asking what a "moral" reason is, Posner's position is a good place to begin.

## II

What reason or reasons might one have, other than reasons that appeal to one's self-interest or to one's emotional concerns or to both, for acting in order to serve the welfare of another?

Imagine the following scenario. Sarah is a theist who believes that, in the words of *The First Letter of John*, "God is love."<sup>17</sup> ("Whoever fails to love does not know God, because God is love."<sup>18</sup> "God is love, and whoever remains in love remains in God and God in him."<sup>19</sup>) Sarah also believes that God's act of creating and sustaining the universe is an expression of God/love. In particular, Sarah believes that human beings are the children of God and sisters and brothers to one another,<sup>20</sup> and that the per-

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14. Posner's position does not deny that one's self-interest or emotional concerns or both can support one's doing (or not doing) something that a "moral" reason also supports one's doing. But if my self-interest or emotional concerns or both lead me in one direction and a "moral" reason leads me in another, why should I follow—what reason do I have to follow—the moral reason?

15. See Posner, *supra* note 4, at 1661 (discussing duty to self and others). At one point, Posner refers not just to "others" but, even more extremely, to "unknown" others. See *id.* (referring to "morality in its modern sense [as] a set of duties toward unknown persons"). Even "in its modern sense," however, morality is concerned with what we owe many "known" persons (*e.g.*, spouse, children, parents, friends, etc.) as well as what we owe "unknown persons."

16. For a discussion of how this view is particularly prevalent among moral theorists in the Kantian tradition, see *infra* note 71 and accompanying text.

17. 1 *John* 4:8 (New Jerusalem Bible).

18. *Id.*

19. 1 *John* 4:16.

20. Not that one has to be religious in any conventional or self-conscious sense to believe that all human beings are sisters and brothers to one another. Cf. KRISTEN RENWICK MONROE, *THE HEART OF ALTRUISM: PERCEPTIONS OF A COMMON HUMANITY* 216 (1996):

[I]t is the [altruistic] perspective itself that constitutes the heart of altruism. Without this particular perspective, there are no altruists. . . . [The perspective] consists of a common perception, held by all altruists, that they are strongly linked to others through a shared humanity. This self-perception constitutes such a central core to altruists' identity that it

fect way of life for human beings—the most deeply satisfying way of life of which human beings, as children of God and sisters and brothers to one another, are capable—is one in which human beings abide Jesus' commandment to "love one another; you must love one another just as I have loved you."<sup>21</sup>

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leaves them with no choice in their behavior toward others. They are John Donne's people. All life concerns them. Any death diminishes them. Because they are a part of mankind.

21. 1 *John* 13:34. For Christians, the basic shape of the good life is indicated by the instruction given by Jesus at a Passover seder on the eve of his execution: "I give you a new commandment: love one another; you must love one another just as I have loved you." *Id.*; see also 1 *John* 15:12, 17. See generally THE LOVE COMMANDMENTS: ESSAYS IN CHRISTIAN ETHICS AND MORAL PHILOSOPHY (Edmund N. Santurri & William Werpehowski eds., 1992) [hereinafter LOVE COMMANDMENTS]; GARTH L. HALLETT, CHRISTIAN NEIGHBOR-LOVE: AN ASSESSMENT OF SIX RIVAL VERSIONS (1989).

The "one another" is radically inclusive:

You have heard how it was said, *You will love your neighbor* and hate your enemy. But I say this to you, love your enemies and pray for those who persecute you; so that you may be children of your Father in heaven, for he causes his sun to rise on the bad as well as the good, and sends down rain to fall on the upright and the wicked alike. For if you love those who love you, what reward will you get? Do not even the tax collectors do as much? And if you save your greetings for your brothers, are you doing anything exceptional? Do not even the gentiles do as much? You must therefore set no bounds to your love, just as your heavenly Father sets none to his.

*Matthew* 5:43-48; see *Luke* 6:27-35. Recall, too, the *Parable of the Good Samaritan*:

But the man was anxious to justify himself and said to Jesus, "And who is my neighbour?" In answer Jesus said, "A man was once on his way down from Jerusalem to Jericho and fell into the hands of bandits; they stripped him, beat him and then made off, leaving him half dead. Now a priest happened to be travelling down the same road, but when he saw the man, he passed by on the other side. In the same way a Levite who came to the place saw him, and passed by on the other side. But a Samaritan traveller who came on him was moved with compassion when he saw him. He went up to him and bandaged his wounds, pouring oil and wine on them. He then lifted him onto his own mount and took him to an inn and looked after him. Next day, he took out two denarii and handed them to the innkeeper and said, 'Look after him, and on my way back I will make good any extra expense you have.' Which of these three, do you think, proved himself a neighbour to the man who fell into the bandits' hands?" [The man] replied, "The one who showed pity towards him." Jesus said to him, "Go, and do the same yourself."

*Luke* 10:29-37. In *The New Jerusalem Bible*, a footnote attached to "Samaritan" explains that "[t]he contrast is between the element in Israel most strictly bound to the law of love, and the heretic and stranger, . . . from whom normally only hate could be expected." *Id.* at n:h.

Such a conception of human good is not confined to Christianity or even to the semitic spiritualities. For many Buddhists, for example, the good life centrally involves compassion (*karuna*) for all sentient creatures and therefore for all human beings. Moreover, one need not be religious to believe that the perfect way of life for human beings—the most deeply satisfying way of life of which human beings, as participants in a shared humanity, are capable—is one in which human beings "love one another." See MONROE, *supra* note 20, at 238 ("We do good because that



Sarah has thoroughly internalized Jesus' counsel to "love one another just as I have loved you." Perhaps she has done so because of the way her parents raised her, or perhaps her life just happened to unfold that way. But suppose the question arises, why should anyone want to internalize Jesus' counsel; what reason does anyone have to do so? The answer Sarah would give would appeal to one's self-interest: As I said, Sarah believes that the perfect way of life for human beings is one in which human beings "love one another." "We are well aware that we have passed over from death to life because we love our brothers. Whoever does not love, remains in death."<sup>22</sup>

Sarah recently acted in a certain way, she recently did something, in order to serve the welfare of several starving children in sub-Saharan Africa, because she concluded that acting as she did was, all things considered, the most appropriate way for her to express her love for the children—children to whom Sarah has no special relation and, indeed, whom Sarah has never met and does not know and almost certainly will never meet or know. Was Sarah's reason for acting as she did a "moral" reason? It would be an extremely uncommon use of "moral" to insist that Sarah's reason was not a moral reason. Yet, Sarah's reason does not satisfy Posner's test, because it appeals directly to Sarah's emotional concern: Sarah acted out of her love for the starving children. Sarah's love is what Christians call, *agape*, as distinct from *eros* or *philia*.<sup>23</sup> So, Sarah's reason for acting as she did to serve the children's welfare is a powerful counterexample to Posner's account of what a "moral" reason is.

(Moreover, Sarah's reason appeals indirectly to Sarah's self-interest, in this sense: if the question were to arise, "Why should Sarah, or anyone else, want to internalize Jesus' commandment to 'love one another just as I have loved you'?" the answer Sarah and like-minded believers would give is an answer that appeals to one's self-interest: "Because the way to live the most deeply satisfying life of which human beings, as children of God and sisters and brothers to one another, are capable is to internalize Jesus' commandment; it is actually to love one another as Jesus loved us."<sup>24</sup>)

It bears emphasis that Sarah acted as she did to serve the children's welfare not because God, understood as the metaphysically supreme legis-

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is what makes us human, fully and richly human, and not just greedy and graspingly self-centered.").

22. 1 John 3:14.

23. The literature in Christian ethics on *agape* is voluminous. See HALLET, *supra* note 21, at 33 (defining *agape*); STEPHEN J. POPE, THE EVOLUTION OF ALTRUISM AND THE ORDERING OF LOVE 61 (1994); LOVE COMMANDMENTS, *supra* note 21, at 4; EDWARD COLLINS VACEK, S.J., LOVE, HUMAN AND DIVINE: THE HEART OF CHRISTIAN ETHICS 151-91 (1994).

24. And if one is not committed to flourishing as a human being? "There is perhaps nothing to say to a man who would like to be a centaur. Moral discourse always presupposes the acceptance of humanity and the striving to be and to become ever more fully human." ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 196 (1975).

lator, commanded that she do so. For Sarah, God is not best understood as a legislator, issuing commands that we should obey simply because they are God's commands, or because God will punish us if we do not obey them. A theistic religious vision does not necessarily include, though some conventional theistic religious visions do include, a conception of "God" as metaphysically supreme legislator, issuing directives for human conduct. Indeed, a religious believer might well hold that such a "God"—such an idol—is dead.<sup>25</sup>

Consider the question Socrates poses in Plato's *Euthyphro*. As Peter Cicchino has articulated the question:

Do the gods love—or, to make this discussion truer to the monotheism of most religious people in our society, does God love—what is holy or sacred (*to hosion* in Plato's dialogue) or is a thing holy/sacred because God loves it? An equivalent way of posing the question is "Does God will certain things because they are good for us to do or refrain from doing or are certain things good for us to do or refrain from doing because God wills them?"<sup>26</sup>

For Sarah, for whom God is love, not supreme legislator, some things are good for us to do or refrain from doing not because God commands them, but because God is what (who) God is, because the universe—the universe created and sustained by God who is love in an act that is an expression of God/love—is what it is, and, in particular, because we human beings are who we are. Sarah believes that because God is what God is, the universe is what it is, and we are who we are, and not because of anything willed by a metaphysically supreme legislator, the perfect way of life for us human beings—the most deeply satisfying way of life of which we human beings are capable—is one in which we "love one another just as I have loved you."<sup>27</sup>

Moreover, Sarah acted as she did to serve the starving children's welfare not because she feared eternal damnation if she did not—or even because she longs for eternal union with God. Sarah may love God above all else and long for eternal union with God, which union she may regard as her greatest end, but if she does, such longing is not Sarah's reason for

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25. Cf. Charles Larmore, *Beyond Religion and Enlightenment*, 30 SAN DIEGO L. REV. 799, 799-802 (1993).

26. Letter from Peter Cicchino, *American University School of Law*, to Michael J. Perry, University Distinguished Chair in Law, *Wake Forest University* (Sept. 2, 1998) (quoted with permission) (on file with author). Cf. William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 2000 (1995) (explaining that for Kant, "the concept of the Good is logically prior to the concept of the Divinity").

27. Cf. Steven D. Smith, *Natural Law and Contemporary Moral Thought: A Guide from the Perplexed*, 42 AMERICAN J. JURIS. 299, 325-26 (1997).

acting as she did to serve the children's welfare. Sarah acted out of her love (*agape*) for the children.<sup>28</sup>

For some religious believers, like Sarah, the most powerful reason for acting to serve the welfare of others, especially strangers—and, sometimes, the sole reason—is a religiously based reason; it is, moreover, a reason that appeals directly to one's emotional concern for the Other, as sister/brother (and that, as I have explained, appeals indirectly to one's self-interest). An account of what a "moral" reason is that excludes such a reason—at least, an account that seeks to capture the common understanding and not to stipulate a wildly idiosyncratic understanding—is, in a word, weird. No account of what a "moral" reason is that fails to include such a reason for acting to serve another's welfare—a religiously based reason that appeals to one's emotional concern for the Other—has much currency in a pervasively religious culture, like ours, in which such a reason is the paradigmatic "moral" reason.<sup>29</sup>

In the scenario I sketched above, I have Sarah acting out of her love for the starving children; love is the foundational emotion/sentiment that moves Sarah to act to serve the welfare of the starving children.<sup>30</sup> In his Holmes Lectures, however, Posner writes that:

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28. See Timothy P. Jackson, *The Disconsolation of Theology: Irony, Cruelty, and Putting Charity First*, 20 J. RELIGIOUS ETHICS 1, 19 (1992) (arguing that "a future heaven and/or hell ought not to play much of a role in [Christian] ethics, whatever role they may play in cosmology"); Grace M. Jantzen, *Do We Need Immortality?*, 1 MOD. THEOLOGY 33, 43 (1984) ("Christian faith and Christian commitment bases itself not first and foremost on a hope of survival of death, but on the intrinsic value of a relationship with God, without any reservations about what the future holds—here or hereafter."). But cf. J.L.A. Garcia, *Deus Sive Natura: Must Natural Lawyers Choose?*, in NATURAL LAW, LIBERALISM, AND MORALITY 271, 272 (Robert P. George ed., 1996) ("If acting immorally risks eternal damnation, then there is a limit to how far one strays from prudence in following the moral law even onto the gallows or into the torture chamber.").

29. Consider the opening paragraph of an article that appeared recently in the *New York Times*, a pre-millennial article on the interface of science and religion: As the century began, optimists could easily have convinced themselves that by the time 2000 rolled around there would be nothing left for scientists and theologians to argue about. Each would have long since agreed on how to divvy up the intellectual terrain. Science would continue its inevitable march towards a grand explanation of how the material world works, leaving to religion the endless arguments over why the universe came to be and how people ought to behave in it.

George Johnson, *True Believers: Science and Religion Cross Their Lines in the Sand*, N.Y. TIMES, July 12, 1998, at 4. The final sentence of the paragraph reflects the common understanding that one of the principal tasks of religious inquiry (but not just of religious inquiry) is to discern how human beings, whether all or some, ought to live their lives.

30. In the view of great German Catholic theologian Karl Rahner, not only is there no tension between the commandment to love God and the commandment to love one another, there is "a radical identity of the two loves." KARL RAHNER, 6 THEOLOGICAL INVESTIGATIONS 231, 236 (1969). In the chapter entitled "Reflections on the Unity of the Love of Neighbor and the Love of God," Rahner wrote:

It is radically true, i.e. by an ontological and not merely 'moral' or psychological necessity, that whoever does not love the brother whom he

sees, also cannot love God whom he does not see, and that one can love God whom one does not see only *by* loving one's visible brother lovingly.

*Id.* at 247. Rahner's reference is to a passage in the First Letter of John in which it is written: "Anyone who says 'I love God' and hates his brother, is a liar, since whoever does not love the brother whom he can see cannot love God whom he has not seen." 1 *John* 4:20. In Rahner's view, it is only by loving one's neighbor that one has achieved the ontological/existential state of being/consciousness that constitutes "love of God," even though one may not "believe in God." See RAHNER, *supra*, at 238-39. If Rahner is right, then there is, in the following sense, not two great commandments, but one: Compliance with the first great commandment (to love God) requires compliance with the second (to love one another), and compliance with the second entails compliance with the first. See *id.* at 232. Consider, in that regard, the Last Judgment passage in Matthew's Gospel:

When the Son of man comes in his glory, escorted by all the angels, then he will take his seat on his throne of glory. All nations will be assembled before him and he will separate people one from another as the shepherd separates sheep from goats. He will place the sheep on his right hand and the goats on his left. Then the King will say to those on his right hand, "Come, you whom my Father has blessed, take as your heritage the kingdom prepared for you since the foundation of the world. For I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you made me welcome, lacking clothes and you clothed me, sick and you visited me, in prison and you came to see me." Then the upright will say to him in reply, "Lord, when did we see you hungry and feed you, or thirsty and give you drink? When did we see you a stranger and make you welcome, lacking clothes and clothe you? When did we find you sick or in prison and go to see you?" And the King will answer, "In truth I tell you, in so far as you did this to one of the least of these brothers of mine, you did it to me." Then he will say to those on his left hand, "Go away from me, with your curse upon you, to the eternal fire prepared for the devil and his angels. For I was hungry and you never gave me food, I was thirsty and you never gave me anything to drink, I was a stranger and you never made me welcome, lacking clothes and you never clothed me, sick and in prison and you never visited me." Then it will be their turn to ask, "Lord, when did we see you hungry or thirsty, a stranger or lacking clothes, sick or in prison, and did not come to your help?" Then he will answer, "In truth I tell you, in so far as you neglected to do this to one of the least of these, you neglected to do it to me." And they will go away to eternal punishment, and the upright to eternal life.

*Matthew* 25:31-46. In Matthew's Gospel, these are Jesus' final words to his disciples before the beginning of the passion narrative. *Matthew* states: "Jesus had now finished all he wanted to say, and he told his disciples, 'It will be Passover, as you know, in two days' time, and the Son of Man will be handed over to be crucified.'" *Id.* 26:1-2

It seems to follow, from Rahner's view, that it is a mistake, a confusion, to say that one should love the Other *because* we love, or should love, God and God wants us to—or *because* we fear, or should fear, God and God wants us to. We should say, instead, that to love the Other (who is "sister/brother") just is to love God (who is "parent")—and that we should achieve the ontological/existential state of being/consciousness that constitutes "love of the Other" (equals "love of God") because that state is the highest human good; to have achieved that radically unalienated condition is to have become *truly, fully* human. "We are well aware that we have passed over from death to life because we love our brothers. Whoever does not love, remains in death." 1 *John* 3:14.

altruism . . . is not primarily a *moral* sentiment . . . . When defined broadly, as helping behavior not motivated by the promise of reward or the threat of punishment, altruism is something that can be and often is motivated by love, or by some dilute form of it such as compassion or sympathy. And love and its cognates are not, or at least need not be, moral sentiments.<sup>31</sup>

Similarly, Posner declares that “[t]he moral emotions,” including altruism and love (between which, Posner later explains, he does “not intend to draw a sharp [distinction],”<sup>32</sup>) “are morally neutral. Is Posner right that love is not a moral sentiment, that it is morally neutral?”<sup>33</sup>

Thinkers have long found it useful to distinguish among different kinds of love—in particular, among *eros*, *philia*, and *agape*.<sup>34</sup> Recall Jesus’ commandment to “love one another; love one another just as I have loved you.” The kind of love Jesus urged his followers to bestow on one another—which is also the kind of love he bestowed on them—is *agape*: love of neighbor, where “neighbor” is understood in a radically inclusive sense.<sup>35</sup> It is simply not true that such love—*agape*—is not a moral sentiment. *Agape* is not at all morally neutral. *Agape* is the very foundation of Christian ethics<sup>36</sup>—a point John Noonan emphasizes in his response to Posner’s Holmes Lectures.<sup>37</sup> In reply to Noonan, Posner writes: “There is selfish altruism (‘reciprocal altruism,’ for example) and selfish love; there is also selfless altruism, which is a form of selfless love, as Noonan suggests.<sup>38</sup> My doubts concern the possibility of using this insight to “power moral reasoning.”<sup>39</sup> In this puzzling reply, Posner seems to shift ground. He seems to acknowledge that “selfless love” might be a moral sentiment and not morally neutral, although, cautions Posner, “this insight” cannot “power moral reasoning.”<sup>40</sup> Whatever Posner means to say here, the relevant point is that, in the Gospel vision, one’s love (*agape*) of “one another”

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31. Posner, *supra* note 4, at 1641, 1658; see POSNER, *supra* note 13, at 37 (“Altruism typically is nonmoral—like love . . .”). (At one point in his Holmes Lectures, Posner distinguishes between revulsion based on “morality” and revulsion based on “altruism.” See Posner, *supra* note 4, at 1692 (“The revulsion against Nazism, although understandable without reference to morality, being based on altruism for the victims and fear of the perpetrators . . .”).) But see POSNER, *supra* note 13, at 36 (“Some of us will make a sacrifice to help people we actually dislike; this is not uncommon in the dealings people have with their aged parents. This kind of altruism, when it is not just showing off, is the product of a genuine *moral sentiment*. Call it *dutiful or disinterested altruism*.”) (emphasis added).

32. Posner, *supra* note 5, at 1815.

33. See Posner, *supra* note 4, at 1664.

34. See VACEK, *supra* note 23, at 249-312.

35. See 1 John 13:34.

36. See John T. Noonan, Jr., *Posner’s Problematics*, 111 HARV. L. REV. 1768, 1775 (1998).

37. See *id.*

38. Posner, *supra* note 5, at 1815.

39. *Id.*

40. See *id.*

(in the Gospel's radically inclusive sense of "one another") is the fundamental existential condition (sentiment, emotion, attitude) that animates one's effort to serve the welfare of other human beings, even strangers like him to whom the Good Samaritan ministered,<sup>41</sup> understood as beloved children of God and one's sisters and brothers. So what if "this insight" cannot "power moral reasoning?" A more important observation is that *agape* is not opposed to reason but often requires reason as an instrument of its own fulfillment: One's effort to serve another's welfare often requires one to deliberate—to "reason"—about what will in fact serve another's welfare, or about the best way, all things considered, to serve another's welfare, or about how to accommodate other, competing concerns, such as, for example, the welfare of the community.

### III

The reason Sarah acted to serve the welfare of the starving children is a counterexample to Posner's account of what a "moral" reason is, but it is a religiously based reason. Posner might respond that he meant only to give an account of what a non-religiously based "moral" reason is—an account, that is, of *secular* "moral" reason.<sup>42</sup> After all, Posner is explicit that the "academic moralism" he derides is secular, not religious, in character:

I call theories of morality "moralism" to underscore their aim of changing human behavior and "*academic* moralism" to distinguish academic moral philosophy from moral preaching outside the academy. . . . I am interested in the type of moralizing that is, or at least pretends to be, free from controversial metaphysical commitments such as those of a believing Christian, and so might conceivably appeal to the judges of our secular courts. . . . [R]eligious arguments are not a part of academic moralism.<sup>43</sup>

It isn't obvious why, in giving an account of what a "moral" reason is, we should distinguish between a religiously based reason and a secular reason. The distinction seems *ad hoc*. Nonetheless, let's now consider secular reasons for acting to serve another's welfare. Are there any such reasons, other than reasons that appeal to one's self-interest or to one's emotional concerns or to both? (If not, then, *given Posner's account of "moral,"* there are no secular moral reasons!) Is Posner's account, of what a "moral" reason is, plausible at least with respect to secular reasons for acting to serve another's welfare?

Consider this response: One reason for acting to serve the welfare of another—for example, by refraining from killing her—is that she, like every other person, is "inviolable." To say that a person is "inviolable" is to say, according to the *Oxford English Dictionary*, that the person is "not to be

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41. See *Luke* 10:25-38.

42. See Posner, *supra* note 4, at 1648.

43. *Id.* at 1648, 1649.

violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault."<sup>44</sup> It is possible that by claiming that every person, (or every human being), is inviolable, one is saying—as a religious Jew, for example, or a Christian, would be saying—something substantially equivalent to the proposition that every person is a child of God and a sister/brother to oneself and is therefore inviolable. (As Hilary Putnam has written, the moral image central to what Putnam calls the Jerusalem-based religions “stresse[s] equality and also fraternity, as in the metaphor of the whole human race as One Family, of all women and men as sisters and brothers.”<sup>45</sup>)

But then the reason for acting to serve another’s welfare is a religiously based reason. We are now considering secular reasons, and it is far from clear—very far—on what basis one who is not a religious believer, one who is an agnostic or even an atheist, can claim (indeed, can believe) that every person is inviolable: Why is it the case—in virtue of what is it the case—that every person is, (in the words of the *OED*) “not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault?”<sup>46</sup> As Jeff McMahan has emphasized, “[u]nderstanding the basis of our alleged inviolability is crucial both for determining whether it is plausible to regard ourselves as inviolable, and for fixing the boundaries of the class of inviolable beings.”<sup>47</sup>

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44. 8 OXFORD ENGLISH DICTIONARY 51 (2d ed., 1989).

45. HILARY PUTNAM, *THE MANY FACES OF REALISM* 60-61 (1987). In an essay on *The Spirituality of The Talmud*, Ben Zion Bokser and Baruch M. Bokser state: “From this conception of man’s place in the universe comes the sense of the supreme sanctity of all human life. ‘He who destroys one person has dealt a blow at the entire universe, and he who sustains or saves one person has sustained the whole world.’” Ben Zion Bokser & Baruch M. Bokser, *Introduction: The Spirituality of the Talmud*, in *THE TALMUD: SELECTED WRITINGS* 7 (1989). They continue:

The sanctity of life is not a function of national origin, religious affiliation, or social status. In the sight of God, the humble citizen is the equal of the person who occupies the highest office. As one talmudist put it: “Heaven and earth I call to witness, whether it be an Israelite or pagan, man or woman, slave or maidservant, according to the work of every human being doth the Holy Spirit rest upon him.” . . . As the rabbis put it: “We are obligated to feed non-Jews residing among us even as we feed Jews; we are obligated to visit their sick even as we visit the Jewish sick; we are obligated to attend to the burial of their dead even as we attend to the burial of the Jewish dead.”

*Id.* at 30-31.

46. 8 OXFORD ENGLISH DICTIONARY 51 (2d ed., 1989).

47. In an otherwise laudatory review of a book by Frances Kamm, Jeff McMahan writes:

The burden of the third and final part of the volume is to explain why it is generally not permissible for one to engage in killing even when, by doing so, one could prevent a greater number of killings from occurring. Here, Kamm’s central contention is that people must be regarded as inviolable, as ends-in-themselves. . . . [Kamm’s] arguments often raise difficult questions that the book fails to address. A conspicuous instance of this is Kamm’s failure to identify the basis of our moral inviolability. Understanding the basis of our alleged inviolability is crucial both for deter-

Undeniably, the *religious* (i.e., Jewish and Christian) basis of the claim that every person is inviolable is not appealing to everyone. It was very unappealing to Nietzsche. And even for one to whom it is greatly appealing, it might not be credible. It is not credible, for example, to Jürgen Habermas, who has written:

[By confronting] the conscientious question about deliverance for the annihilated victims[,] . . . we become aware of the limits of that transcendence from within which is directed to this world. But this does not enable us to ascertain the *countermovement* of a compensating transcendence from beyond. That the universal covenant of fellowship would be able to be effective retroactively, toward the past, only in the weak medium of our memory . . . falls short of our moral need. But the painful experience of a deficit is still not a sufficient argument for the assumption of an "absolute freedom which saves in death."<sup>48</sup>

But even if one finds incredible the religious basis of the claim that every person is inviolable, the question persists why—on what (nonreligious) basis—is every person inviolable? Consider Glenn Tinder's assessment:

Nietzsche's stature is owing to the courage and profundity that enabled him to make this all unmistakably clear. He delineated with overpowering eloquence the consequences of giving up Christianity, *and every like view of the universe and humanity*. His approval of those consequences and his hatred of Christianity give force to his argument. Many would like to think that there are no consequences—that we can continue treasuring the life and welfare, the civil rights and political authority, of every person without believing in a God who renders such attitudes and conduct compelling. Nietzsche shows that we cannot. We cannot give up the Christian God—*and the transcendence given other names in other faiths*—and go on as before. We must give up Christian morality too. If the God-man is nothing more than an illusion, the same thing is true of the idea that every individual possesses incalculable worth. The standard of *agape* collapses. It becomes explicable only on Nietzsche's terms: as a device by

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mining whether it is plausible to regard ourselves as inviolable, and for fixing the boundaries of the class of inviolable beings.

Jeff McMahan, *When Not to Kill or Be Killed*, N.Y. TIMES LITERARY SUPP., Aug. 7, 1998, at 31 (reviewing FRANCES KAMM, *MORALITY, MORTALITY, VOLUME 2: RIGHTS, DUTIES, AND STATUS* (1997)). It is revealing that Kamm, one of the principal neo-Kantian moral philosophers among the younger generation of secular moral theorists, "conspicuously" fails in her otherwise rigorously argued book to tell her audience why—in virtue of what—persons are inviolable.

48. Jürgen Habermas, *Transcendence from Within, Transcendence in This World*, in HABERMAS, *MODERNITY, AND PUBLIC THEOLOGY* 226, 238 (Don S. Browning & Francis Schussler Fiorenza eds., 1992).



which the weak and failing exact from the strong and distinguished a deference they do not deserve. Thus the spiritual center of Western politics fades and vanishes.<sup>49</sup>

Is Tinder right? After Nietzsche, is it plausible to think that for one for whom the universe is utterly bereft of transcendent meaning and is, therefore, from a human point of view, absurd,<sup>50</sup> the content of a morality can be substantially equivalent to the content of a morality grounded in the belief that human beings are children of God and sisters and brothers to one another? Nietzsche declared: "Naivete: as if morality could survive

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49. Glenn Tinder, *Can We Be Good Without God: The Political Meaning of Christianity*, ATLANTIC, Dec. 1989, at 69, 80 (passages rearranged and emphasis added). (For Tinder's book-length treatment of the relevant issues, see GLENN TINDER, *THE POLITICAL MEANING OF CHRISTIANITY: AN INTERPRETATION* (1989)). Tinder's emphasis on the Christian tradition will surely and understandably be, for some non-Christians, a provocative distraction from his fundamental point. Tinder's (and Nietzsche's) point loses nothing, however, if the emphasis is placed not on the Christian tradition but on the Jewish, for example. Recall the comment on the Talmud quoted in *supra* note 45. Nor does the point lose anything if the emphasis is put, for example, on the (Mahayana) Buddhist tradition, with its insistence on compassion for all sentient creatures as the fitting response to the true—as distinct from the illusory—nature of the world.

50. See BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 368 (1980). Bruce Ackerman has announced: "There is no moral meaning hidden in the bowels of the universe." See also BERTRAND RUSSELL, *MYSTICISM AND LOGIC* 45-46 (1957):

That Man is the product of causes which had no prevision of the end they were achieving; that his origin, his growth, his hopes and fears, his loves and his beliefs, are but the outcome of accidental collocations of atoms; that no fire, no heroism, no intensity of thought and feeling, can preserve an individual life beyond the grave; that all the labours of the ages, all the devotion, all the inspiration, all the noonday brightness of human genius, are destined to extinction in the vast death of the solar system, and that the whole temple of Man's achievement must inevitably be buried beneath the debris of a universe in ruins—all these things, if not quite beyond dispute, are yet so nearly certain, that no philosophy which rejects them can hope to stand. Only within the scaffolding of these truths, only on the firm foundation of unyielding despair, can the soul's habitation henceforth be safely built.

Ackerman's declaration, like Russell's before him, brings to mind one of Nietzsche's passages:

Man a little, eccentric species of animal, which—fortunately—has its day; all on earth a mere moment, an incident, an exception without consequences, something of no importance to the general character of the earth; the earth itself, like every star, a hiatus between two nothingness, an event without plan, reason, will, self-consciousness, the worst kind of necessity, *stupid* necessity—Something in us rebels against this view; the serpent vanity says to us: "all that *must* be false, *for* it arouses indignation— Could all that not be merely appearance? And man, in spite of all, as Kant says—"

FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 169 (Walter Kaufmann & R.J. Hollingdale, trs., & Walter Kaufmann, ed., 1967).

when the *God* who sanctions it is missing! The 'beyond' absolutely necessary if faith in morality is to be maintained."<sup>51</sup>

Let me pause to forestall a misunderstanding. My point here is *not* that there can be no morality without God.<sup>52</sup> One obviously need not believe in God to believe in and adhere to a morality. Many persons who do not believe in God believe in and adhere to a morality. Nor is my point that one cannot be good unless one believes in God. Many people who do not believe in God are good—even saintly—just as many people who believe in God are not good. My point, which I am about to elaborate, is simply that it is obscure on what basis one who is not a religious believer—one who is an agnostic or an atheist—can claim that every person is inviolable.

Imagine a cosmology according to which the universe is, finally and radically, meaningless—or, even if meaningful in some sense, not meaningful in a way hospitable to our deepest yearnings for what Abraham Heschel called "ultimate relationship, ultimate belonging."<sup>53</sup> Consider, for example, Clarence Darrow's bleak vision (as recounted by Paul Edwards):

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51. NIETZSCHE, *supra* note 50, at 147. Commenting on "anthropocentrism, [which] by abolishing all horizons of significance, threatens us with a loss of meaning and hence a trivialization of our predicament," Charles Taylor has written:

At one moment, we understand our situation as one of high tragedy, alone in a silent universe, without intrinsic meaning, condemned to create value. But at a later moment, the same doctrine, by its own inherent bent, yields a flattened world, in which there aren't very meaningful choices because there aren't any crucial issues.

CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* 68 (1992).

52. In commenting on a draft of this essay, Peter Cicchino addressed "what [he] took to be the suggestion that Nietzsche may have been right to see morality in the coffin at God's funeral." Cicchino, *supra* note 26.

53. For the person deep in the grip of, the person claimed by, the problem of meaning, "[t]he cry for meaning is a cry for ultimate relationship, for ultimate belonging", wrote Heschel.

It is a cry in which all pretensions are abandoned. Are we alone in the wilderness of time, alone in the dreadfully marvelous universe, of which we are a part and where we feel forever like strangers? Is there a Presence to live by? A Presence worth living for, worth dying for? Is there a way of living in the Presence?

Is there a way of living compatible with the Presence?

ABRAHAM J. HESCHEL, *WHO IS MAN?* 73 (1965); see FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 235 (Norton ed., 1976) ("For the secret of man's being is not only to live but to have something to live for. Without a stable conception of the object of life, man would not consent to go on living, and would rather destroy himself than remain on earth, though he had bread in abundance."). This is one of the Grand Inquisitor's statements in chapter 5 of Book Five. Cf. W.D. Joske, *Philosophy and the Meaning of Life*, in *THE MEANING OF LIFE* 248, 250 (E.D. Klemke ed., 1981) ("If, as Kurt Vonnegut speculates in *The Sirens of Titan*, the ultimate end of human activity is the delivery of a small piece of steel to a wrecked space ship wanting to continue a journey of no importance whatsoever, the end would be too trivial to justify the means."); ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 586 (1981) ("If the cosmic role of human beings was to provide a negative lesson to some others ('don't act like them') or to provide needed food for passing intergalactic travelers who *were* important, this would not suit our aspirations—not even if

Darrow, one of the most compassionate men who ever lived, . . . concluded that life was an "awful joke." . . . Darrow offered as one of his reasons the apparent aimlessness of all that happens. "This weary old world goes on, begetting, with birth and with living and with death," he remarked in his moving plea for the boy-murderers Loeb and Leopold, "and all of it is blind from the beginning to the end." Elsewhere he wrote: "Life is like a ship on the sea, tossed by every wave and by every wind; a ship headed for no port and no harbor, with no rudder, no compass, no pilot; simply floating for a time, then lost in the waves." In addition to the aimlessness of life and the universe, there is the fact of death. "I love my friends," wrote Darrow, "but they all must come to a tragic end." Death is more terrible the more one is attached to things in the world. Life, he concludes, is "not worth while," and he adds . . . that "it is an unpleasant interruption of nothing, and the best thing you can say of it is that it does not last long."<sup>54</sup>

One prominent contemporary proponent of a Darrowian cosmology, the physicist, and Nobel laureate, Steven Weinberg, "finds his own world-view 'chilling and impersonal.' He cannot understand people who treat the absence of God and of God's heaven as unimportant."<sup>55</sup> Where is there a place in a cosmological view like Darrow's or Weinberg's for the conviction that every person is inviolable to gain a foothold?

Indeed, for one who believes that the universe is utterly bereft of transcendent meaning, why—in virtue of what—is every person inviolable?<sup>56</sup> Judge Posner apparently shares my lack of comprehension:

Thomas Nagel is a self-proclaimed atheist, yet he thinks that no one could *really* believe that 'we each have value only to ourselves and to those who care about us.' Well, to whom then? Who confers value on us without caring for us in the way that we care for

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afterwards the intergalactic travelers smacked their lips and said that we tasted good.").

54. Paul Edwards, *Life, Meaning and Value of*, 4 ENCYCLOPEDIA OF PHILOSOPHY 467, 468 (Paul Edwards ed., 1967). Whether Clarence Darrow was in fact "one of the most compassionate men who ever lived" is open to question. For a revisionist view of Darrow, see GARY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS*, chs. 8-9 (1990).

55. See John Leslie, *Is It All Quite Simple? The Physicist's Search for a Theory of Everything*, N.Y. TIMES LITERARY SUPP., Jan. 29, 1993, at 3 (reviewing, inter alia, STEVEN WEINBERG, *DREAMS OF A FINAL THEORY* (1992)). Cf. Paul Davies, *The Holy Grail of Physics*, N.Y. TIMES BOOK REV., Mar. 7, 1993, at 11 (reviewing, inter alia, Weinberg's book) ("Reductionism [in physics] may be a fruitful research method, but it is a bleak philosophy. . . . If the world is but a collection of inert atoms interacting through blind and purposeless forces, what happens to . . . the meaning of life?").

56. Ronald Dworkin has attempted to answer this question, but his answer, as I have explained elsewhere, succeeds only in showing that Dworkin doesn't understand the question. See PERRY, *FOUR INQUIRIES*, *supra* note 3, at 25-39.

friends, family, and sometimes members of larger human communities? Who else but the God in whom Nagel does not believe?<sup>57</sup>

I am inclined to concur in R.H. Tawney's view: "The essence of all morality is this: to believe that every human being is of infinite importance, and therefore that no consideration of expediency can justify the oppression of one by another. But to believe this it is necessary to believe in God."<sup>58</sup> It bears emphasis that one need not be a religious believer to concur in Tawney's view. Jeffrie Murphy, for example, insists that it is, for him, "very difficult—perhaps impossible—to embrace religious convictions," but he nonetheless claims that "the liberal theory of rights requires a doctrine of human dignity, preciousness and sacredness that cannot be utterly detached from a belief in God or at least from a world view that would be properly called religious in some metaphysically profound sense."<sup>59</sup> Murphy continues:

[T]he idea that fundamental moral values may require [religious] convictions is not one to be welcomed with joy [by non-religious enthusiasts of the liberal theory of rights]. This idea generates tensions and appears to force choices that some of us would prefer not to make. *But it still might be true for all of that.*<sup>60</sup>

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57. Posner, *supra* note 4, at 1687 (citing THOMAS NAGEL, *THE LAST WORD* 130 (1997)). Cf. James Boyd White, *Talking About Religion in the Language of Law: Impossible but Necessary*, 81 MARQ. L. REV. 177, 197-99 (1998) (explaining why he has difficulty understanding what one who is not religious believer might be saying in affirming Declaration of Independence's insistence on "equality" of all human beings).

58. R.H. TAWNEY'S *COMMONPLACE BOOK* 67 (J.M. Winter & D.M. Joslin eds., 1972). Tawney wrote the quoted passage in his diary on August 13, 1913. Three days earlier, on August 10, he quoted in his diary T.W. Price, Midland secretary of the Workers' Educational Association and lecturer at Birmingham University: "Unless a man believes in spiritual things—in God—altruism is absurd. What is the sense of it? Why shld [sic] a man recognize any obligation to his neighbour, unless he believes that he has been put in the world for a special purpose and has a special work to perform in it? A man's relations to his neighbour become meaningless unless there is some higher power above them both." Cf. Dennis Prager, *Can We Be Good Without God?*, 9 ULTIMATE ISSUES 3, 4 (1993) ("If there is no God, you and I are purely the culmination of chance, pure random chance. And whether I kick your face in, or support you charitably, the universe is as indifferent to that as whether a star in another galaxy blows up tonight.").

59. Jeffrie Murphy, *Afterword: Constitutionalism, Moral Skepticism, and Religious Belief*, in *CONSTITUTIONALISM: THE PHILOSOPHICAL DIMENSION* 239, 248 (Alan S. Rosenbaum ed., 1988).

60. *Id.* (emphasis added); see Czeslaw Milosz, *The Religious Imagination at 2000*, *NEW PERSPECTIVES Q.*, Fall 1997, at 32:

What has been surprising in the post-Cold War period are those beautiful and deeply moving words pronounced with veneration in places like Prague and Warsaw, words which pertain to the old repertory of the rights of man and the dignity of the person.

I wonder at this phenomenon because maybe underneath there is an abyss. After all, those ideas had their foundation in religion, and I am

Nietzsche asked: "Now suppose that belief in God has vanished: the question presents itself anew: 'who speaks?'"<sup>61</sup> Echoing Nietzsche's question a brutal century later, Art Leff wrote:

Napalming babies is bad.  
 Starving the poor is wicked.  
 Buying and selling each other is depraved.  
 Those who stood up to and died resisting Hitler, Stalin, Amin,  
 and Pol Pot—and General Custer too—have earned salvation.  
 Those who acquiesced deserve to be damned. There is in the  
 world such a thing as evil.  
 [All together now:] Sez who? God help us.<sup>62</sup>

#### IV

Some contemporary moral theorists (some of the "academic moralists" Posner attacks in his Holmes Lectures) have recently been talking about what they call "the sources of [moral] normativity."<sup>63</sup> They have

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not over-optimistic as to the survival of religion in a scientific-technological civilization. Notions that seemed buried forever have suddenly been resurrected. But how long can they stay afloat if the bottom is taken out?

61. NIETZSCHE, *supra* note 50, at 157.

62. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249 (1979); see Noonan, *supra* note 36, at 1768: "These three propositions [if no lawgiver, no law; if no law, no judge; if no judge, no judgment], which have the strength of self-evidence, sum up the predicament of most of the academic moralists who are Judge Posner's targets. These moralists acknowledge no lawgiver and no judge. Their vulnerability is patent. Their attempts to pronounce moral judgments are doomed to failure."

63. See CHRISTINE M. KORSGAARD with G. A. COHEN ET AL., *THE SOURCES OF NORMATIVITY* (Onora O'Neill ed., 1996); see also Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1777, 1789-91 (1998).

Has Christine Korsgaard, the eminent Kant scholar (and, as I draft this essay, chair of the Harvard Department of Philosophy), joined Ronald Dworkin in claiming that the value (dignity, worth, sacredness, inviolability) of the Other is not objective but merely subjective? In addressing "the questions of the kind of value humanity has in Kant's ethics and what gives it that value," Korsgaard has written:

More recently, especially in *The Sources of Normativity*, I have come to think of the value we place even on ourselves as also conferred. To that extent, I agree . . . that there is a continuity between the value of humanity and the value of other things: they are all the results of our own acts of conferring value.

Christine M. Korsgaard, *Motivation, Metaphysics, and the Value of the Self: A Reply to Ginsborg, Guyer, and Schneewind*, 109 ETHICS 49, 63 (1998). Cf. Elshtain, *supra* note 9, at 400 (commenting critically on MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* (1996)):

But [the problem with this view is that], given that all value is constructed by humans beings, there is nothing that simply "has value," nothing in which value inheres. So we are in an exclusively anthropocentric universe: No value exists apart from, or outside of, humans placing it upon objects or concepts. This means we are unable to say that there are things, like babies, that should never be treated as commodities.

been trying to identify one or more such sources; they have been trying to identify what it is that yields, or might yield, what they take to be our moral obligation to serve the welfare of another by acting in certain ways, especially by refraining from harming another in certain ways. The reasons for which they search are secular reasons that appeal neither to one's self-interest nor to one's emotional concerns.<sup>64</sup> But are there any such reasons? Are there any secular sources of normativity other than self-interest and emotional concern? In the preceding section, we considered one response: the putative inviolability of every person. The problem with that response, I suggested, is twofold: If religiously based, the response is not secular and, moreover, *does* appeal to one's emotional concern; if not religiously based, the response, though secular, seems altogether obscure. Let's now consider three further responses.

First: "A fundamental reason for acting in certain ways<sup>65</sup> to serve the welfare of another—for example, by feeding him or her—is that morality demands that one do so, even if one's self-interest and/or emotional concerns do not." (By "another," I mean, at the limit, the radically Other: the person to whom one has no special relation and, indeed, whom one has never met and does not know and almost certainly will never meet or know.) This response, however, is conspicuously unhelpful. To say that "morality" requires one to do (or not to do) something is to say that "moral" reasons require one to do (or not to do) it. But the fundamental issue before us is: What is a "moral" reason? The issue, in particular, is whether it makes sense to say that "moral" reasons are reasons (for acting to serve another's welfare) that appeal neither to one's self-interest nor to one's emotional concerns. After all, Sarah's religiously based reason, which is commonly regarded as a "moral" reason, appeals directly to her emotional concern for the Other (and indirectly to her self-interest). The question therefore arises whether there are any secular reasons for acting to serve another's welfare, other than reasons that appeal to one's self-interest or to one's emotional concerns or to both?<sup>66</sup>

Second: "A fundamental reason for acting (in certain ways) to serve the welfare of another—that is, a fundamental reason other than self-interest or emotional concern—is that one would act irrationally if one chose not to do so." Imagine that you and two friends emerge from a visit to the United States Holocaust Memorial Museum in Washington, D.C.

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64. See *infra* note 73 and accompanying text.

65. Perhaps at all times, perhaps only at certain times; perhaps in all places, perhaps only in certain places; perhaps under all conditions, perhaps only under certain conditions.

66. It has been suggested to me, in discussion, that "because X is the morally right thing to do" is a moral reason that appeals neither to one's self-interest nor to one's emotional concerns. But "because X is the morally right thing to do" is not a moral reason. The reason we have for thinking that X is the morally right thing for us to do—if we have such a reason—is a moral reason. The question I'm addressing is whether there are any moral reasons that do not appeal either to one's self-interest or to one's emotional concerns.

What sort of breakdown, what sort of failure, does the Holocaust represent, you ask. One friend's reply: a failure of rationality. The other friend has a different response: a failure of love. Which answer gets closer to the heart of the matter, in your view? Which answer is more resonant? Does the immorality of the monstrously evil and heartbreaking acts you saw depicted all around you as you walked through the museum inhere in the Nazis (and others) acting irrationally? Or does it inhere in the Nazis' failure to recognize that the Jews, too, were their sisters and brothers? In any event, it is obscure why—or in what sense—it would be irrational for one to make a choice on the basis of one's self-interest or emotional concerns (or both) rather than make a competing choice on a basis that, *ex hypothesi*, does not involve one's self-interest or emotional concerns.<sup>67</sup>

67. I do not mean to deny that it might be irrational, because contrary to one's self-interest, all things considered, for one to violate certain normative limits on one's choices. But we are now searching for a secular reason for acting to serve another's welfare that does *not* involve self-interest (or emotional concern).

For an example of a morality based on rational self-interest, see David Gauthier, *Rational Constraint: Some Last Words*, in CONTRACTARIANISM AND RATIONAL CHOICE: ESSAYS ON DAVID GAUTHIER'S MORALS BY AGREEMENT 323, 330 (Peter Vallentyne ed., 1991) [hereinafter CONTRACTARIANISM] (arguing "that rational persons will recognize a role for constraints, both unilateral and mutual, in their choices and decisions, that rational persons would agree ex ante on certain mutual constraints were they able to do so, and that rational persons will frequently comply with those mutual constraints in their interactions"). As one commentator has observed, "[Gauthier's] main interest is to give an account of rational and impartial constraints on conduct. If this does not capture the traditional conception of morality, so much the worse for the traditional conception. Rationality—not morality—is the important notion for him." Peter Vallentyne, *Gauthier's Three Projects*, in CONTRACTARIANISM, *supra*, at 2.

[Gauthier's contractarian] view of the relationship between the individual and society has some implications about which even the most committed contractarians are uneasy. If justice is wholly a matter of reciprocity, do we have any obligation to support people who are so severely handicapped that they can offer us nothing in return? . . .

Gauthier has to concede that the handicapped lie 'beyond the pale of morality tied to mutuality'; if we have moral duties in these cases, [Gauthier's] theory cannot account for them. Each of us may feel *sympathy* for the handicapped, and if so, the welfare of the handicapped will be among the ends we pursue; but this is a matter of preference, not moral obligation.

*Cf.* Robert Sugden, *The Contractarian Enterprise*, in RATIONALITY, JUSTICE AND THE SOCIAL CONTRACT: THEMES FROM MORAL BY AGREEMENT 1, 8 (David Gauthier & Robert Sugden eds., 1993):

At the core of [Gauthier's project] is the thought that traditional moral theory relies on the supposed existence of entities, such as God or goodness, which are external to human life yet somehow matter. A defensible morality should dispense with such mysterious entities, and accept that life has no meaning outside itself.

Gauthier has written that *Morals By Agreement*:

[I]s an attempt to challenge Nietzsche's prescient remark, "As the will to truth . . . gains self-consciousness . . . morality will gradually perish." It is an attempt to write moral theory for adults, for persons who live consciously in a post-anthropomorphic, post-theocentric, post-technocratic world. It is an attempt to allay the fear, or suspicion, or hope, that with-

I see no point in saying that it is more rational to prefer one's neighbors to one's family in the event of a nuclear holocaust, or more rational to prefer leveling off incomes around the world to preserving the institutions of liberal Western societies. To use the word "rational" to commend one's chosen solution to such dilemmas, or to use the term "yielding to the force of the better argument" to characterize one's way of making up one's mind, is to pay oneself an empty compliment.<sup>68</sup>

Third: "A fundamental reason for acting to serve the welfare of another is that our innately human sentiments—in particular, our innately human altruism—lead us to do so." (This, or something like it, might be Martha Nussbaum's response.<sup>69</sup>) One who doubts that "our" altruistic

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out a foundation in objective value or objective reason, in sympathy or in sociality, the moral enterprise must fail.

In the end, however, Gauthier does not challenge Nietzsche so much as he embraces a Nietzschean conception of justice. Nietzsche wrote:

Justice (fairness) originates among those who are approximately *equally powerful*, as Thucydides . . . comprehended correctly. . . . [J]ustice is repayment and exchange on the assumption of an approximately equal power position. . . . Justice naturally derives from prudent concern with self-preservation; that means, from the egoism of the consideration: "Why should I harm myself uselessly and perhaps not attain my goal anyway?"

Friedrich Nietzsche, *All Too Human*, in BASIC WRITINGS OF NIETZSCHE 148 (Walter Kaufman trans., 1973).

68. Richard Rorty, *Justice as a Larger Loyalty*, in JUSTICE AND DEMOCRACY: CROSS-CULTURAL PERSPECTIVES 9, 19 (Ron Bontekoe & Marietta Stepaniants eds., 1997) [hereinafter Rorty, *Justice*].

A prominent secular argument for human rights is Alan Gewirth's. Gewirth's argument has been extremely controversial, to say the least. See, e.g., GEWIRTH'S ETHICAL RATIONALISM (Edward Regis ed., 1984); BRIAN BARRY, THEORIES OF JUSTICE 285-88 (1989). For a careful restatement and defense of Gewirth's argument, see DERYCK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENSE OF ALAN GEWIRTH'S ARGUMENT FOR THE PRINCIPLE OF GENERIC CONSISTENCY (1991). For a skeptical review of Beyleveld's book, see NICK FOTION, 101 ETHICS 579 (1993). It bears emphasis that, as Garth Hallett has observed, "Gewirth does not argue that the [Principle of Generic Consistency] is true, but only that any agent who wishes to be rational must accept it." Hallett then writes, in a footnote:

In *The Dialectical Necessity of Morality*, 15, Deryck Beyleveld makes this point more clearly than does Gewirth: "Use of the dialectically necessary method implies that Gewirth is not attempting to establish the PGC itself as a truth. What he attempts to establish as a necessary truth is the proposition 'A PPA [Prospective Purposive Agent] contradicts that it is a PPA if it does not accept/act in accordance with the PGC.'"

*Id.* at 184 n. 29

69. In an essay critiquing "skepticism about practical reason in literature and in the law," Nussbaum asserts that "the good of other human beings is an end worth pursuing in its own right, apart from its effect on [one's] own pleasure or happiness. . . ." Martha C. Nussbaum, *Skepticism about Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 718 (1994). It is clear, in her essay, that by "other human beings" Nussbaum means not just *some* other human beings but *all* other human beings. But *why* is the good of every human being an end worth pursuing in its own right? Nussbaum does not say. She merely reports, in the final paragraph of her essay, that "it seems to be a mark of the human being to care for



sentiments are a feature of our species nature—indeed, who rejects the idea that there is any such thing as “human” nature—might put the point differently: “A fundamental reason for acting in certain ways to serve the welfare of another is that our Eurocentric sentiments lead us to do so.” (This might be Richard Rorty’s response.<sup>70</sup>) The conspicuous problem

others and feel disturbance when bad things happen to them.” *Id.* at 744; see Martha C. Nussbaum, *Compassion: The Basic Social Emotion*, 13 SOC. PHIL. & POL’Y 27 (1996). Now, few will deny that it seems to be a mark of the normal human being to care for *some* other human beings—the members of one’s family, say, or even of one’s tribe or nation or race or religion. But it is not a mark of all (normal) human beings—it is not a mark of “the human being” as such—to care for *all* other human beings. Consider Richard Rorty’s comparison of “the rather rare figure of the psychopath, the person who has no concern for any human being other than himself[,]” to “the much more common case: the person whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this range, the ones he or she thinks of as pseudohumans.” Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993 111, 123-24 [hereinafter Rorty, *Human Rights*]. (According to Rorty, moral philosophy, to its detriment, has “systematically neglected” the latter in favor of the former. *Id.* at 124.) Rorty’s “much more common case” is also much more common than the person at the other extreme from the psychopath: someone who cares deeply about the authentic well-being of every human being. We sometimes mark just how *uncommon* such persons are, in the real world, by calling them “saints.”

70. Rorty denies what, according to Rorty,

[H]istoricist thinkers [ever since Hegel] . . . have denied[:] that there is such a thing as “human nature” or the “deepest level of the self.” Their strategy has been to insist that socialization, and thus historical circumstance, goes all the way down—that there is nothing “beneath” socialization or prior to history which is definatory of the human. Such writers tell us that the question “What is it to be a human being?” should be replaced by questions like “What is it to inhabit a rich twentieth-century democratic society?”

RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY xiii [hereinafter RORTY, CONTINGENCY]. Rorty writes approvingly of “[t]his historicist turn,” which, he says, “has helped free us, gradually but steadily, from theology and metaphysics—from the temptation to look for an escape from time and chance. It has helped us substitute Freedom for Truth as the goal of thinking and of social progress.” *Id.* For an excellent critique of this and related aspects of Rorty’s views, see Timothy P. Jackson, *The Theory and Practice of Discomfort: Richard Rorty and Pragmatism*, 51 THOMIST 270 (1987).

Richard Rorty has therefore recommended that we simply stop trying to defend the idea of human rights; in particular, he has recommended that we abandon what he calls our “human rights foundationalism” which, in Rorty’s view, has proven a futile project. See Rorty, *Human Rights*, *supra* note 69, at 116. For example:

Kant’s account of the respect due to rational agents tells you that you should extend the respect you feel for people like yourself to all featherless bipeds. This is an excellent suggestion, a good formula for secularizing the Christian doctrine of the brotherhood of man. But it has never been backed up by an argument based on neutral premises, and it never will be.

*Id.* at 124-25. Human rights foundationalism is not merely futile; it is, according to Rorty, “outmoded.” *Id.* at 116. There is, says Rorty, a better project for us (*i.e.*, for those of us who embrace the cause of human rights): “We see our task as a matter of making our own culture—the human rights culture—more self-conscious and

more powerful, rather than of demonstrating its superiority to other cultures by an appeal to something transcultural" (like the putative inviolability/sacredness/whatever of every human being). *Id.* at 117-18; see RORTY, *CONTINGENCY*, *supra*, at 189-98.

But is it really, enough, when confronted by intellectual or, worse, existential repudiations of human rights, to retreat, *pace* Rorty, into a kind of ethnocentrism—at one point Rorty refers to "our Eurocentric human rights culture"—proclaiming proudly and loudly that although among us late-twentieth-century North Americans and Western Europeans (and perhaps a few others), a great fondness for human rights, or for "the moral point of view," is nothing more than a culturally acquired taste, it is *our* acquired taste and we are willing, if necessary, to fight and even die for it. Rorty, *Human Rights*, *supra* note 69, at 126. For a discussion of this acquired taste, see *infra* note 93 and accompanying text. Not even among all of us late-twentieth-century North Americans, etc., has the taste—the cultural preference—for human rights been acquired. Moreover, why shouldn't those of us who have acquired a fondness for human rights try to disabuse ourselves of that fondness (if it is only an acquired taste)—at least, why shouldn't we try to moderate that fondness—once it becomes clear that indulging a fondness for human rights can be, economically, militarily, etc., a rather costly proposition? Most importantly, if the fondness for human rights some of us have is, at bottom, nothing more than an acquired taste, what is there to say to those who have not acquired the taste—and who might even have acquired a taste for violating (what we call) human rights—other than, perhaps, "Try it, you'll like it (maybe)?" Indeed, Rorty has recommended that we say something to that effect:

[T]he rhetoric we Westerners use in trying to get everyone to be more like us would be improved if we were more frankly ethnocentric, and less professedly universalist. It would be better to say: Here is what we in the West look like as a result of ceasing to hold slaves, beginning to educate women, separating church and state, and so on. Here is what happened after we started treating certain distinctions between people as arbitrary rather than fraught with moral significance. If you would try treating them that way, you might like the results.

Rorty, *Justice*, *supra* note 68, at 19-20.

"Fraternity is an inclination of the heart," writes Rorty, "one that produces a sense of shame at having much when others have little. It is not the sort of thing that anybody can have a theory about or that people can be argued into having." Richard Rorty, *Fraternity Reigns: The Case for a Society Based Not on Rights But on Unselfishness*, N.Y. TIMES, Sept. 26, 1996, at 155, 157 [hereinafter Rorty, *Fraternity*]. Rorty suggests that we try to convert others to our human rights culture—that we try to change their hearts—partly through a process of "manipulating sentiments, [of] sentimental education." Rorty, *Human Rights*, *supra* note 69, at 119, 122. But in what sense is it a *progress*, and not merely a *change*, of sentiments, if the new sentiments don't more accurately reflect a *truth* about the Other, namely, that the Other is—*really* is—sacred, that the Other is, somehow, sister/brother? In any event, in the view of most of us who embrace the cause of human rights, the fundamental wrong done, when human rights are violated, is not that our sentiments—the sentiments of "our Eurocentric human rights culture"—are offended. The fundamental wrong done is much deeper than that: It is that, somehow, the very order of the world—the *normative* order of the world—is transgressed.

We might be quite wrong to believe—it might be false to believe—that the world has a normative order that is transgressed by violations of human rights. Relatedly, the belief might be false that "fraternity" is not *just* "an inclination of the heart" but an inclination of the heart that reflects—that is rooted in and animated by—perhaps the deepest truth about the normative order of the world, a truth that yields Jesus' "new commandment: love one another; you must love one another just as I have loved you." *John* 13:34. Rorty, however, does not argue that it is a false belief that the normative order of the world is transgressed by violations of

with these responses, however, is that neither response gives a reason of the sort for which we are now searching: a secular reason for acting (in certain ways) to serve another's welfare that does *not* appeal to one's emotional concerns (or to one's self-interest). Each response gives a reason that appeals to an overriding emotional concern that we are imagined to have: in the case of the first response, an emotional concern that the respondent imagines to be an innately human sentiment or attitude; in the case of the second response, an emotional concern that the respondent imagines to be a culturally specific ("Eurocentric?") sentiment or attitude.

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I began this section by asking whether there are any secular reasons for acting to serve the welfare of another—any reasons other than the putative inviolability of every person—that appeal neither to one's self-

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human rights and that fraternity is *just* an inclination of the heart. Whether or not it is a false belief is not the sort of issue the "pragmatist" Rorty finds it useful to address; indeed, it is the sort of issue he finds it useful to marginalize. See Rorty, *Human Rights*, *supra* note 69, at 119. If the idea of human rights is ineliminably religious, then human rights foundationalism is, finally, a theological project. In Rorty's view, however, theology is not a useful conversation. See, e.g., Richard Rorty, *Religion as Conversation-Stopper*, 3 COMMON KNOWLEDGE 1, 2 (1994) [hereinafter Rorty, *Religion*]. I am skeptical, however, that we can, without serious costs, marginalize the issue. There is not only the question I have already posed: In what sense is it a progress of sentiments, and not merely a change? There are other important problems. For example: If we have no reason to believe that the world has a normative order that is transgressed by violations of human rights—at least, if we have no reason to be other than agnostic about the issue—and if we nonetheless coerce others, and perhaps even, at the limit, kill others, in the name of protecting human rights, then are we coercing and killing in the name of nothing but our sentiments, our preferences, our "inclination of the heart?" Does Rorty want to deny that it would be deeply problematic for us to coerce and kill in the name of nothing but our sentiments/preferences? Does Rorty want to say something like this: "It's a brutal world out there. It's either them or us. It's either their culture or ours—either their sentiments/preferences or ours. It's not that might makes right. It's just that there is no right, only might. May our might, not theirs, prevail!" Rorty did once say something fully congruent with that position:

[W]hen the secret police come, when the torturers violate the innocent, there is nothing to be said to them of the form "There is something within you which you are betraying. Though you embody the practices of a totalitarian society which will endure forever, there is something beyond those practices which condemns you."

RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (ESSAYS: 1972-1980) xlii (1982) [hereinafter RORTY, *CONSEQUENCES*].

Tim Jackson has asked, in commenting on Rorty's views: "Can one imagine dying for irony's sake?" Jackson, *supra* note 28, at 10. We can also ask: Can one imagine killing for irony's sake?

Outside our philosophical study . . . we don't think we're merely "expressing our acceptance" of norms calling for mutual respect and social justice when we make (sometimes great) personal sacrifices in order to comply with these norms. We act as if we think the authority of these norms is not "in our heads" or traceable only to societal conventions and our (cognitive or affective) reactions to them, but "real."

JEAN E. HAMPTON, *THE AUTHORITY OF REASON* 120 (Richard Healey ed., 1998) (Thanks to George Wright for calling this passage to my attention.)

interest nor to one's emotional concerns. I have been unable to locate a single such reason.

Recall what, for Judge Posner, it means to say that a reason for acting to serve another's welfare is a "moral" reason: The reason is not—it does not appeal to—either one's self-interest or one's emotional or sentimental concern for or attachment to another. A "moral" reason, in Posner's view, is meant to "check" both one's self-interest and one's emotional concerns. However, Posner's position, about what a "moral" reason is, now seems mistaken: There are no discernible reasons for acting to serve another's welfare, neither any religiously based reasons nor any secular reasons, that do not appeal to one's self-interest—perhaps by appealing to what is in the interest of the community, or a community, with which one identifies and on whose collective welfare (one believes) one's own individual welfare depends—or to one's emotional concerns. In the real world, then, if not in every moral theorist's study, one's reasons for acting to serve the welfare of another, no less than one's reasons for other kinds of intentional action, appeal to one's self-interest or to one's emotional concerns or to both. This conclusion would seem altogether unremarkable—like the conclusion that the earth is (almost) round—were it not for so much contemporary moral theory that has suggested otherwise.<sup>71</sup>

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71. See ROGER SCRUTON, *SEXUAL DESIRE: A MORAL PHILOSOPHY OF THE EROTIC* 325, 326 (1986):

The weakness of the Kantian position lies in its attribution of a "motivating force" to reason—in its denial of Hume's principle that reason alone cannot be a motive to action. The Aristotelian position involves no commitment to the idea of a "pure practical reason". It recognises that practical reasoning concludes in action only because it begins in desire. The "practical syllogism" has a practical premise, and to the agent with evil desires no reason can be given that will, by its sheer force as a reason, suffice to make him good.

... Aristotle's invocation of happiness, as the final end of human conduct, is essentially correct. Happiness is the single final answer to the question "why do that?", the answer that survives the conflict with every rival interest or desire. In referring to happiness we refer, not to the satisfaction of impulses, but to the fulfillment of the person. . . .

But what is happiness? Kant dismissed the idea as empty: happiness, he argued, simply stands for the generality of human desires: it means different things for different people, and provides no coherent motive of its own. Following Aristotle, however, I shall propose an idea of happiness as a kind of "flourishing."

See also Stephen Scott, *Motive and Justification*, 85 J. PHIL. 479, 499 (1988):

When he was deliberating about how to live, St. Augustine asked, "What does anything matter, if it does not have to do with happiness?" His question requires explanation, because he is not advising selfishness nor the reduction of other people to utilities, and even qualification, because other things can have some weight. All the same, the answer he expects is obviously right: only a happy life matters conclusively. If I had a clear view of it, I could have no motive to decline it, I could regret nothing by accepting it, I would have nothing about which to deliberate further.

On the term "happiness," compare Julia Annas, *Virtue and Eudaimonism*, 15 SOC. PHIL. & POL'Y 37, 53 n.35 (1998):

Of course, the emotional concerns that persons have vary, sometimes enormously, among persons and communities. As do beliefs about what is good, or bad, for those for whom one is concerned. And so the moralities that persons and communities have—the moralities they *practice*, whether or not they also *preach* them—vary too, sometimes enormously. Different moralities—competing moralities—are grounded both in different emotional or sentimental concerns or attachments and in different beliefs about what is good, or bad, for human beings, whether some human beings or, at the limit, all human beings. Still, there appear to be no reasons for acting to serve another's welfare that do not appeal to one's self-interest or to one's emotional concerns. My reference here is not to the merely textbook moralities that academic moralists teach in their classes, but to real, flesh-and-blood moralities—the moralities, however ugly, that different human communities across time and space have actually lived.<sup>72</sup>

I should note here that my criticism of Judge Posner's account of "moral" reasons is less a criticism of Posner than of contemporary secular moral theorists in the Kantian tradition, who have influenced Posner's understanding of the "moral" by insisting, in one way or another, that a reason that appeals to one's self-interest or emotional concerns is not a "moral" reason.<sup>73</sup> As Posner himself notes, "Kant's footprints are all over

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Despite the differences between *eudaimonia* and happiness which I have explored in this essay, and which are striking to philosophers reflecting on virtue and happiness, "happiness" is clearly the correct translation for *eudaimonia* in ancient literature of all kinds, and it would be a mistake to conclude that we should translate *eudaimonia* by some other term.

with, Richard Taylor, *Ancient Wisdom and Modern Folly*, 13 *MIDWEST STUD. IN PHIL.* 54, 57, 58 (1988):

The Greek *eudaimonia* is always translated "happiness," which is unfortunate, for the meaning we attach to the word *happiness* is thin indeed compared to what the ancients meant by *eudaimonia*. *Fulfillment* might be a better term, though this, too, fails to capture the richness of the original term. . . . The concept of happiness in modern philosophy, as well as in popular thinking, is superficial indeed in comparison.

72. See Robin W. Lovin & Frank E. Reynolds, *Focus Introduction*, 14 *J. RELIGIOUS ETHICS* 48, 56-57 (1986):

[M]oral norms are closely linked to beliefs about the facts of human life and the world in which human life is set. . . . To know what people find good in human action, we must know something about the powers and vulnerabilities they find characteristically human, and about how they explain the constraints that nature, power, finitude, and mortality impose on persons. . . . [W]hen they formulate moral norms and impose them on themselves and others [, persons] . . . are trying to formulate relationships between realities and human purposes that allow them "to live as [they] would in a world that is the way it is."

73. See Richard Rorty, *Justice*, *supra* note 68, at 11-12:

Would it be a good idea to treat "justice" as the name for loyalty to a certain very large group, the name for our current largest loyalty, rather than the name for something distinct from loyalty? Could we replace the notion of "justice" with that of loyalty to that group—for example, one's fellow-citizens, or the human species, or all living things? Would anything be lost by this replacement?

modern moral theory."<sup>74</sup> Moreover, Posner's account of "moral" reasons is only a secondary aspect of his Holmes Lectures. Posner's primary point is that "the type of moral theory I call 'academic moralism' . . . does not provide a solid basis for moral judgments, let alone for legal ones."<sup>75</sup> "My thesis has a strong form and a weak one. The strong form . . . is that moral theory does not provide a solid basis for moral judgments. The weak form is that even if moral theory can provide a solid basis for some moral judgments, it should not be used as a basis for *legal* judgments."<sup>76</sup> His principal "effort [is] to show, not that moral philosophy as a whole, much less morality, is bunk, but only that the subset of moral philosophy that I call academic moralism is incapable of contributing significantly to the resolution of moral or legal issues . . . ."<sup>77</sup>

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Moral philosophers who remain loyal to Kant are likely to think that a *lot* would be lost. Kantians typically insist that justice springs from reason, and loyalty from sentiment. Only reason, they say, can impose universal and unconditional moral obligations, and our obligation to be just is of this sort. It is on another level from the sort of affectional relations that create loyalty. Jurgen Habermas is our most prominent contemporary philosopher to insist on this Kantian way of looking at things: the thinker least willing to blur either the line between reason and sentiment, or the line between universal validity and historical consensus. But contemporary philosophers who depart from Kant, either in the direction of Hume (like Annette Baier) or in the direction of Hegel (like Charles Taylor) or in that of Aristotle (like Alasdair MacIntyre), are not so sure. . . .

What Kant would describe as [a conflict] between moral obligation and sentiment, or between reason and sentiment, is, on a non-Kantian account of the matter, a conflict between one set of loyalties and another set of loyalties. The idea of a *universal* moral obligation to respect human dignity gets replaced by the idea of loyalty to a very large group—the human species.

See also Simon Blackburn, *Am I Right?* N.Y. TIMES BOOK REV., Feb. 28, 1999, at 24 (reviewing T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1999)). Simon Blackburn writes that "[w]e can still do moral philosophy if we recognize that many of our concerns have passion and desire as their ancestors rather than truth and reason." Referring to "the view that reasons that are seen only in the pull of the will and of love are not real reasons at all," Blackburn says: "[W]hen we reflect what a cold picture of human nature that [view] implies, I think we *should* find it rather sad." For a devastating critique of Scanlon's book, see Colin McGinn, *Reasons and Unreasons*, NEW REPUBLIC, May 24, 1999, at 34 (book review).

74. Posner, *supra* note 4, at 1664 n.48. Cf. Elshtain, *supra* note 9, at 392: "[T]he task of defending moral propositions and principles is overtaken increasingly by neo-Kantian philosophers or post-structuralists who aim to undermine the neo-Kantian enterprise."

75. Posner, *supra* note 4, at 1638, 1639 (passages rearranged).

76. *Id.* at 1639. For Posner's explanation of what he means by "academic moralism," see text accompanying *supra* note 31.

77. Posner, *supra* note 4, at 1655. (Posner adds, where I have put the ellipsis: "or to the improvement of personal behavior"). See *id.* at 1822-23.

## V

As I noted at the beginning of this Essay, although talk about morality, mainly in the form of moral argument, is pervasive in the contemporary legal academy, it is often obscure what we citizens of the legal academy, and others, are talking about—and often clear that we are not all talking about the same thing—when we talk (argue) about “morality.” We are now in a position to address a question that is a variation on the question that is the title of this essay: What is “moral” argument about? When is the subject matter of an argument such that we call it a “moral” argument?

“Moral” argument is often, and fundamentally, about this:

Which human beings ought we to care about—which ones, that is, besides those we already happen to care about, those we already happen to be emotionally or sentimentally concerned for or attached to: ourselves, our families, our tribes, and so on? Variations on the question: Which human beings ought to be the beneficiaries of our respect; the welfare, the well-being, of which human beings ought to be the object of our concern? Which human beings are subjects of justice;<sup>78</sup> which are inviolable (or “sacred”)? All human beings, or only some?<sup>79</sup>

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78. For a discussion, see *supra* note 65 and accompanying text.

79. Recall Richard Rorty's comparison of “the rather rare figure of the psychopath, the person who has no concern for any human being other than himself[,]” to “the much more common case: the person whose treatment of a rather narrow range of featherless bipeds is morally impeccable, but who remains indifferent to the suffering of those outside this range, the ones he or she thinks of as pseudohumans.”

There is a related question, but it is really just a variation on the question about which human beings are inviolable: Who is a human being; that is, what members of the species *Homo sapiens* are truly, fully human? Women? Non-whites? Jews? Cast as the claim that only some individuals are human beings, the claim that only some human beings are inviolable has been, and remains, quite common. According to Nazi ideology, for example, the Jews were pseudohumans. See Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357, 363 (1993). There are countless other examples, past and present:

Serbian murderers and rapists do not think of themselves as violating human rights. Further they are not doing these things to fellow human beings, but to *Muslims*. They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans. They are making the same sort of distinction as the Crusaders made between the humans and the infidel dogs, and the Black Muslims make between humans and blue-eyed devils. [Thomas Jefferson] was able both to own slaves and to think it self-evident that all men are endowed by their creator with certain inalienable rights. He had convinced himself that the consciousness of Blacks, like that of animals, “participates more of sensation than reflection.” Like the Serbs, Mr. Jefferson did not think of himself as violating *human* rights.

The Serbs take themselves to be acting in the interests of true humanity by purifying the world of pseudohumanity.

(But, as Charles Taylor has emphasized, "Anglo-Saxon moral philosophy has tended to see morality as concerned with questions of what we ought to do and to occlude or exclude questions about what it is good to be *or what it is good to love*."<sup>80</sup>)

"Moral" argument is also often about this:

What is good—truly good—for those we should care about including ourselves, and what is bad for them? In particular: What are the requirements of one's well-being? (Again, the "one" may be, at one extreme, a particular human being or, at the other, each and every human being.) What is friendly to the achievement of one's well-being, and what is hostile to it? What is conducive to or even constitutive of one's human well-being, and what impedes or even destroys it?<sup>81</sup>

Finally, "moral" argument is often about priorities among conflicting goods:

Should I act in a way that is good for "A" (someone I should care about) in one respect but bad for her in another? Or in away that is good for "A" but not good, or even bad, for "B" (someone else I should care about)? Or in a way that is good for me but not good, or even bad, for you? (That, according to the Gospel vision, I should love the Other does not mean that I should not love myself too. According to the Gospel vision, I should love the Other "as myself".<sup>82</sup>) Or in a way that is good for my family

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Rorty, *Human Rights*, *supra* note 69, at 112, 125. Cf. Elshtain, *supra* note 9, at 385 (referring to "the truths we have come to understand about human beings, the sort of creatures they are, and the kind of treatment that should be theirs simply by virtue of their humanness").

80. Taylor, *Murdoch & Moral Philosophy*, *supra* note 3, at 1 (emphasis added).

81. Cf. D.J. O'CONNOR, AQUINAS AND NATURAL LAW 57 (1968): "In so far as any common core can be found to the principal versions of the natural law theory, it seems to amount to the statement that the basic principles of morals and legislation are, *in some sense or other*, objective, accessible to reason and based on human nature." *Id.* Of course, achieving well-being is not an either-or matter, but a matter of degree.

82. See *Matthew* 22:34-40.

But when the Pharisees heard that he had silenced the Sadducees they got together and, to put him to the test, one of them put a further question, 'Master, which is the greatest commandment of the Law?' Jesus said to him, 'You must love the Lord your God with all your heart, with all your soul, and with all your mind. This is the greatest and the first commandment. The second resembles it: You must love your neighbor *as yourself*. On these two commandments hang the whole Law, and the Prophets too.

*Id.* (emphasis added); see *Mark* 12:28-34; *Luke* 10:25-28. For a discussion on the relation between the two commandments, see *supra* note 21 and accompanying text. Cf. J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 243 (1977):

D.D. Raphael, in *THE STANDARD OF MORALS*, in *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* 75 (1974-75) follows Edward Ullendorff in pointing out that whereas 'Thou shalt love thy neighbor as thyself' represents the



(tribe, nation, etc.) but not good, or even bad, for your family?<sup>83</sup>

"Moral" argument is often and preeminently about one or more of these three large subjects: Which human beings ought we to care about? What is truly good for those we should care about—and what is bad for them? And how should we resolve conflicts between goods—in particular, between what is good for some we should care about and what is good for others we should care about? As between the first and second questions, the second—or at least a particular instance of it—is, existentially, the more fundamental of the two. Normally, one cares about oneself; one is committed to one's own welfare. So, a particular instance of the question "What is truly good for those we do or should care about?" is the question "What is truly good for oneself?"<sup>84</sup> And a particular instance of that question, in turn, is "Which human beings is it truly good for one to care about?"<sup>85</sup> But it is useful, I think, to keep the two questions distinct: Which human beings ought we to care about? And what is truly good for those we do or should care about—and what is bad for them?

Consider the first—and the most fundamental—of the three basic "moral" questions I have identified: Which human beings ought we to care about? Some religions give a radically inclusive answer—for example: "Love one another; love one another just as I have loved you." (Again, the "one another" is radically inclusive.<sup>86</sup>) According to the Gospel vision, we have reason to care about every human being—indeed, we have reason to love (in the sense of *agape*) every human being. We have reason to respect every human being; we have reason to be concerned about the well-being of every human being. All human beings are subjects of justice; all are inviolable.

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Greek of the Septuagint (*Leviticus* 19:18) and of the New Testament, the Hebrew from which the former is derived means rather 'You shall treat your neighbour lovingly, for he is like yourself.'

83. See generally GARTH L. HALLETT, *PRIORITIES AND CHRISTIAN ETHICS* (1998); see also PETER UNGER, *LIVING HIGH AND LETTING DIE: OUR ILLUSION OF INNOCENCE* (1996).

84. See generally Scott, *supra* note 71 (discussing Augustine).

85. According to the Gospel vision, the answer is "Each and every other human being, because each and every other human being is a child of God and a sister/brother to oneself." No life better befits us as God's children, no life better fulfills us as beings created as God has created us, than to "love one another" just as Jesus loved us (according to the Gospel vision). See 1 *John* 3:14. "We are well aware that we have passed over from death to life because we love our brothers. Whoever does not love, remains in death." As I asked earlier: Is it plausible to think that for one for whom the universe is utterly bereft of transcendent meaning and is, therefore, from a human point of view, absurd, the content of a morality can be substantially equivalent to the content of a morality grounded in the belief that human beings are children of God and sisters and brothers to one another?

86. For a discussion, see *supra* note 21 and accompanying text.

Much of modern secular moral philosophy reflects its religious genealogy in giving a similarly (*i.e.*, radically) inclusive answer.<sup>87</sup> Indeed, the proposition that every human being is inviolable (or some functionally equivalent proposition) is axiomatic for so many secular moralities that many secular moral philosophers have come to speak of "the moral point of view" as that view according to which "every person [has] some sort of equal status."<sup>88</sup> Bernard Williams has noted that:

[I]t is often thought that no concern is truly moral unless it is marked by this universality. For morality, the ethical constituency is always the same: the universal constituency. An allegiance to a smaller group, the loyalties to family or country, would have to be justified from the outside inward, by an argument that explained how it was a good thing that people should have allegiances that were less than universal.<sup>89</sup>

But, as I said earlier, I have no idea on what basis one who is not a religious believer can give a radically inclusive answer—can say, for example, say that each and every human being is inviolable. Let me put the point somewhat differently. Assume one asks: *Why* ought we to care—what reason do we have to care, if any—about every human being; *why* ought we to respect every human being; *why* ought we to be concerned about the well-being of every human being; *why* are all human beings subjects of justice; *why* are all inviolable? Christianity has a response to such inquiry, though one might not find the response even a little persuasive: Every human being is a child of God and a sister or brother to oneself, and no life better befits us as God's children, no life better fulfills us as beings created as God has created us (*imago Dei*), than to "love one another" just as Jesus loved us. "We are well aware that we have passed over from death to life because we love our brothers. Whoever does not love, remains in death."<sup>90</sup> (Indeed, one might, like Nietzsche, find the response distasteful.) Put aside the question whether any nonreligious ("secular") response to such inquiry is persuasive. (You may believe that no religious response is persuasive.) The prior question is whether any nonreligious response to such inquiry is truly responsive. Listen, in that regard, to Jürgen Habermas: "It is true that a philosophy that thinks postmetaphysically cannot answer the question that [David] Tracy . . . calls attention to: why be moral at all?"<sup>91</sup> (Here, the question "why be moral at all?" is the

87. There are exceptions—for example, David Gauthier. See generally, *supra* notes 70 & 71 and accompanying text.

88. JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* 239 (1987).

89. See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 14 (1985).

90. 1 *John* 3:14.

91. Habermas, *supra* note 48, at 239. What Habermas then goes on to say is really quite remarkable:

At the same time, however, this philosophy can show why this question does not arise meaningfully for communicatively socialized individu-

question “why accept the moral point of view”—*i.e.*, the view according to which “every person [has] some sort of equal status.”<sup>92</sup>)

Let me conclude with this thought: If no nonreligious response is truly responsive, perhaps it is at least partly because in the real world, if not in every academic moralist’s study, such an inquiry is, finally, religious

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als. We acquire our moral intuitions in our parents’ home, not in school. And moral insights tell us that we do not have any good reasons for behaving otherwise: for this, no self-surpassing of morality is necessary. It is true that we often behave otherwise, but we do so with a bad conscience. The first half of the sentence attests to the weakness of the motivational power of good reasons; the second half attests that rational motivation by reasons is more than nothing [*auch nicht nichts ist*—moral convictions do not allow themselves to be overridden without resistance.

*Id.* Let’s put aside the fact that “we” acquire our moral “intuitions” in many places besides (or in addition to) our parents’ home—in the streets, for example. The more important point, for present purposes, is that we do not all acquire the same moral intuitions. Some of us acquire moral intuitions that enable us to ignore, and perhaps even to brutalize, the other without any pangs of “conscience.” It is incredible that in the waning days of this unbearably brutal century, Habermas—writing in Germany of all places—could suggest otherwise. We need not even look at the oppressors themselves; we need look only at those whose passivity makes them complicitors. The real world is full of what Primo Levi called “us-ism.” See Nathan Stoltzfus, *Dissent in Nazi Germany*, ATLANTIC, Sept. 1992, at 87, 94:

Those on the Rosenstrasse who risked their lives for Jews did not express opposition to anti-semitic policies per se. They displayed primarily what the late Primo Levi, a survivor of Auschwitz, called ‘selfishness extended to the person closest to you . . . us-ism.’ In most of the stories I have heard of Aryans who risked their lives for Jews to whom they were married, they withdrew to safety, one by one, the moment their loved ones were released. Their protests bring home to us the iron limits, the tragically narrow borders, of us-ism.

The effort to evade the why-be-moral question by distinguishing between “reasons” and “motives” is unavailing. See Henry B. Veatch, *Modern Ethics, Teleology, and Love of Self*, 75 *MONIST* 52, 60 (1992):

[T]he stock answer given to this question [“Why should I be moral?”] has long been one of trying to distinguish between a *reason* and a *motive* for being moral. For surely, it is argued, if I recognize something to be my duty, then I surely have a reason to perform the required action, even though I have no motive for performing it. In fact, even to ask for a motive for doing something, when one already has a reason for doing it, would seem to be at once gratuitous and unnecessary—at least so it is argued. Unhappily, though, the argument has a dubious air about it at best. For does it amount to anything more than trying to prove a point by first attempting to make a distinction, implying that the distinction is no mere distinction, but a distinction with a difference—viz. the distinction between a reason and a motive. But then, having exploited the distinction, and yet at the same time insinuating that one might conceivably have a reason for doing something, but no motive for doing it, the argument draws to its conclusion by surreptitiously taking advantage of the fact that there possibly is no real distinction between a reason and a motive after all, so that if one has a reason for doing a thing, then one has a motive for doing it as well. In other words, it’s as if the argument only succeeds by taking back with its left hand what it had originally given with its right.

92. See *supra* note 87 and accompanying text.

(or metaphysical) in character, and therefore no response that strenuously avoids the inevitable, connected religious questions makes much sense. In the real world, one's response to such an inquiry has long been intimately bound up with one's response—one's answers—to certain other fundamental questions: Who are we?; where did we come from; what is our origin, our beginning? Where are we going; what is our destiny, our end?<sup>93</sup> What is the meaning of suffering? Of evil? Of death? And there is the cardinal question, the question that comprises many of the others: Is human life ultimately meaningful or, instead, ultimately bereft of meaning, meaningless, absurd?<sup>94</sup> If any questions are fundamental, *these* questions—"religious or limit questions"<sup>95</sup>—are fundamental. Such questions—"naïve" questions, "questions with no answers", "barriers that cannot be breached"<sup>96</sup>—are "the most serious and difficult . . . that any human being or society must face . . ."<sup>97</sup> John Paul II is surely right in his recent encyclical, *Fides et Ratio*, that such questions "have their common

93. See HESCHEL, *supra* note 53, at 28. "In an old rabbinic text three other questions are suggested: 'Whence did you come?' 'Whither are you going?' 'Before whom are you destined to give account?'" "The questions Tolstoy asked, and Gauguin in, say, his great Tahiti triptych, completed just before he died ('Where Do We Come From? What Are We? Where Are We Going?'), are the eternal questions children ask more intensely, unremittingly, and subtly than we sometimes imagine." ROBERT COLES, *THE SPIRITUAL LIFE OF CHILDREN* 37 (1990). "All people by nature desire to know the mystery from which they come and to which they go." DENISE LARDNER CARMODY & JOHN TULLY CARMODY, *WESTERN WAYS TO THE CENTER: AN INTRODUCTION TO RELIGIONS OF THE WEST* 198-99 (1983).

94. Communities, especially historically extended communities—"traditions"—are the principal matrices of religious answers to such questions:

Not the individual man nor a single generation by its own power, can erect the bridge that leads to God. Faith is the achievement of many generations, an effort accumulated over centuries. Many of its ideas are as the light of the star that left its source a long time ago. Many enigmatic songs, unfathomable today, are the resonance of voices of bygone times. There is a collective memory of God in the human spirit, and it is this memory which is the main source of our faith.

Abraham Heschel, *Faith*, in 10 *THE RECONSTRUCTIONIST*, Nov. 3 & 17 (1944). For a later statement on faith, incorporating some of the original essay, see ABRAHAM J. HESCHEL, *Man is Not Alone* 159-76 (1951).

95. DAVID TRACY, *PLURALITY AND AMBIGUITY: RELIGION, HERMENEUTICS, HOPE* 86 (1987).

96. In Milan Kundera's *The Unbearable Lightness of Being*, the narrator, referring to "the questions that had been going through Tereza's head since she was a child," says that:

[T]he only truly serious questions are ones that even a child can formulate. Only the most naïve of questions are truly serious. They are the questions with no answers. A question with no answer is a barrier that cannot be breached. In other words, it is questions with no answers that set the limits of human possibilities, describe the boundaries of human existence.

MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* 139 (1984).

97. DAVID TRACY, *THE ANALOGICAL IMAGINATION* 4 (1981). Tracy adds: To formulate such questions honestly and well, to respond to them with passion and rigor, is the work of all theology. . . . Religions ask and respond to such fundamental questions . . . Theologians, by definition, risk

source is the quest for meaning which had always compelled the human heart" and that "the answer given to these questions decides the direction which people seek to give to their lives."<sup>98</sup>

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an intellectual life on the wager that religious traditions can be studied as authentic responses to just such questions.

98. JOHN PAUL II, ON THE RELATIONSHIP BETWEEN FAITH AND REASON: *FIDES ET RATIO*, issued on Sept. 14, 1998. In the introduction to *Fides et Ratio*, John Paul II writes:

Moreover, a cursory glance at ancient history shows clearly how in different parts of the world, with their different cultures, there arise at the same time the fundamental questions which pervade human life: Who am I? Where have I come from and where am I going? Why is there evil? What is there after this life? These are the questions which we find in the sacred writings of Israel and also in the Veda and the Avesta; we find them in the writings of Confucius and Lao-Tze, and in the preaching of Tirthankara and Buddha; they appear in the poetry of Homer and in the tragedies of Euripides and Sophocles as they do in the philosophical writings of Plato and Aristotle. They are questions which have their common source in the quest for meaning which has always compelled the human heart. In fact, the answer given to these questions decides the direction which people seek to give to their lives.

*Id.* at Introduction, pt.1; see *id.* chp. 3, pt. 26 (noting that *Fides et Ratio* would more accurately be named *Fides et Philosophia*). We find a similar statement in the Second Vatican Council's Declaration on the Relation of the Church to Non-Christian Religions (*Nostra Aetate*, 1):

People look to their different religions for an answer to the unsolved riddles of human existence. The problems that weigh heavily on people's hearts are the same today as in ages past. What is humanity? What is the meaning and purpose of life? Where does suffering originate, and what end does it serve? How can genuine happiness be found? What happens at death? What is judgement? What reward follows death? And finally, what is the ultimate mystery, beyond human explanation, which embraces our entire existence, from which we take our origin and toward which we tend?

Why should we think that the "academic moralists" Posner condemns in his Holmes Lectures have some specialized knowledge, some expertise, that enables them to struggle with one or more of these questions—including, in particular, the question "Which human beings ought we to care about?"—more effectively than other persons can or do, both other persons inside the academy and other persons outside it? That we should so think far from obvious. How well *anyone* struggles with such questions is a separate matter.

Consider, too, the second of the two large "moral" inquiries: *What is good—truly good—for those we do or should care about (including ourselves)? And what is bad for them? What are the requirements of well-being, whether the well-being of some human beings or that of each and every human being? What is conducive to or even constitutive of well-being, and what impedes or even destroys it?* Why should we think that academic moralists are, as *such*, more "expert" than other persons (both inside and outside the academy) at pursuing instances of this inquiry? Imagine this multiple choice question: "Of the following, who are best prepared, in virtue of training and practice, to address difficult, controversial questions about the requirements of human well-being, the conditions of human fulfillment? (a) psychologists; (b) anthropologists; (c) pastoral counselors; (d) social workers; (e) academic moralists." It's an impossible call as among (a)-(d), but isn't (e) easily ruled out as a serious possibility? A suggestive comment by Michele Moody-Adams, in her book *Fieldwork in Familiar Places*, is apt here: "[T]here is often more to be learned from the engaged moral inquiry of 'workmanlike' moral agents and inquirers than from the disen-

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gaged speculations of moral theorists and social scientists." MICHELE M. MOODY-ADAMS, *FIELDWORK IN FAMILIAR PLACES: MORALITY, CULTURE, AND PHILOSOPHY* 224 (1997). Cf. Cicchino, *supra* note 26:

As someone who has spent his adult life—as a Jesuit and as an attorney—in direct services to poor people, to prisoners, to the homeless, to gay and lesbian youth, I am amazed at the lack of such direct experience with poor and suffering human beings among my friends and colleagues in the academy and especially among those who write academic moral philosophy. Pedro Arrupe, former General Superior of the Society of Jesus, used to exhort all Jesuits, especially those in intellectual service, to go to the soup kitchens, shelters, and prisons and, at a minimum, tithe time to the materially poor and socially disenfranchised. This, I take it, was no more than an extension of what Ignatius had done when he allowed Jesuits to act as advisors to the bishops at the Council of Trent: each Jesuit was to serve several hours each day in hospitals for the poor. And medieval hospitals were about as hellish as human institutions get. Arrupe's exhortations can also be seen as integral to the praxis-reflection model, and its demand for existential integrity, that the theology of liberation in Latin America had developed in the 1970s.

Posner certainly doesn't think that academic moralists are especially well positioned to discern what morality requires. In his view, they are especially poorly positioned. According to Posner, "the fruitful moral debates take place outside the precincts of academic moralism." Posner, *supra* note 4, at 1642.

